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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 : Appellant's Brief

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

FILED
FEB 16 1957

KEITH HOLBROOK and GENEVE
K. HOLBROOK,

Plaintiffs-Respondents,

- vs. -

ELWOOD S. CARTER and LINDA
N. CARTER,

Defendants,

J. HENRY EHLERS and NELLIE
J. EHLERS,

Defendants-Appellants.

APPELLANTS' BRIEF

Appeal from Judgment of
Third District Court for Salt Lake County
Honorable Leonard W. Elton, Judge

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Case No.
10777

APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action to quiet title to real property in the County of Salt Lake, State of Utah. Respondents claim title by adverse possession against the fee title holders and also against appellants, who hold the tax title to the property as tenants in common with respondents.

DISPOSITION IN THE LOWER COURT

The case was submitted to the court on an agreed statement of facts and judgment was entered quieting title to the property in respondents and against all defendants, including the appellants herein.

RELIEF SOUGHT ON APPEAL

The fee title holders have not appealed from the lower court's decision. This appeal is taken only by the appellants, as holders of the tax title as tenants in common with respondents, seeking reversal of the court's decision in favor of respondents on the grounds that the stipulated facts and the law do not support the court's decision. Appellants also seek to have the case remanded to the lower court for an accounting of the rents and profits and for partition of the land.

STATEMENT OF FACTS (R. 21-23)

On July 1, 1949, Salt Lake County sold to Rennold Pender, Margaret J. Eliason and J. Henry Ehlers, appellant herein, the tax title to the property involved in this action, and issued its tax deed conveying the property to these three individuals as tenants in common. The property involved is located immediately north of and adjoining the dairy farm of respondents.

At the time they received the tax deed, Rennold Pender and J. Henry Ehlers orally agreed between themselves that Pender could use Ehler's one-third interest

in the property, and as consideration therefor would pay the taxes on the property as they became due. The taxes on the property were paid each year thereafter by Pender or by respondents. Ehlers from time to time and each year personally checked the tax records to make certain that the taxes had been paid.

On June 11, 1951, Pender conveyed his interest in the property to respondents by quitclaim deed and on June 21, 1961, Margaret J. Eliason conveyed her interest in the property to respondents, also by quitclaim deed. Appellants did not join in these deeds, nor have they conveyed their interest in the property at any other time.

Immediately upon receipt of the quitclaim deeds, respondents went into possession of the property, enclosed it with a fence and made use of it as part of their dairy farm operation. For three or four years following June, 1951, respondents plowed and planted the property and since that time have used the property for grazing. No buildings or other improvements were ever constructed on the property. All profits from crops and pasturage were received and retained by respondents. Appellant J. Henry Ehlers was aware of the use made of the property by respondents and of the fencing and personally went through the gates in the fence from time to time. The public at large has made no use of the property without the consent of respondents.

Shortly after receiving the quitclaim deeds from Pender and Eliason, the respondents, through their agent,

W. Louis Gardner, contacted Ehlers and offered to purchase his interest in the property. Ehlers replied to Gardner that they were not interested in selling.

Appellant J. Henry Ehlers, prior to July 1949, had acquired tax title to other properties and was generally aware of the acts required to obtain title by adverse possession.

ARGUMENT

POINT I.

THE ACTS OF RESPONDENTS WERE NOT SUFFICIENT TO ESTABLISH TITLE BY ADVERSE POSSESSION AGAINST THEIR COTENANTS.

Pender, Eliason and Ehlers became cotenants of the property when they purchased the tax title in July 1949. The quitclaim deeds from Pender and Eliason to respondents placed respondents in the position of their grantors and they, therefore, became cotenants with Ehlers. Respondents did not consider themselves as sole owners of the property and at all times recognized the interest of Ehlers. Their offer to purchase Ehlers' interest indicated their knowledge that he was their cotenant, holding an undivided one-third interest in the property. *Morton v. Morton*, 286 S.W. 2d 702 (Tex. Civ. App. 1955).

Respondents claim that they gained title by adverse possession on the grounds that they were in sole possession of the property, paid taxes thereon for the statutory seven-year period and also that they fenced, plowed,

planted and grazed the property. These acts may be sufficient to adverse the fee title holders but are decidedly insufficient to adverse a cotenant. The relationship between cotenants is such that the acts necessary to start the adverse possession statute running against one and in favor of another must almost amount to actual ouster.

The nature of this fiduciary relationship between cotenants is indicated by the following quotation from 4 THOMPSON, REAL PROPERTY § 1801, at 136 (1961 repl):

One of the legal consequences that ensues from the existence of a cotenancy whether a joint tenancy, a tenancy in common, or a tenancy by the entireties is the existence of a fiduciary relationship of a certain nature between the cotenants. . . . Its major aspects are (a) that neither cotenant can acquire nor hold an interest in the property that is adverse to the cotenancy's interest without acquiring it for the benefit of all cotenants; (b) that no cotenant can himself hold adversely to the other cotenants except under stated conditions; (c) that one cotenant so acquiring an outstanding adverse interest for the benefit of all is entitled to contribution from the other cotenants for their proportionate shares and for security therefor; and (d) that neither cotenant can place a burden on nor derive a profit or advantage from the property without the consent of the others. Each has an implied obligation to sustain and protect the common title. . . .

And, speaking more specifically to what is required for one to obtain title by adverse possession against his

cotenant, the same authority states, in 4 THOMPSON, REAL PROPERTY § 1810, at 204-07 (1961 repl.):

The entry and possession of one tenant in common are presumed not to be adverse to his cotenants. His occupation is presumed to be in accordance with his right as part owner to the possession of the whole undivided land.

Until evidence of an actual ouster is shown the possession of one cotenant is the possession of all. This is true even where one cotenant conveys his interest to a stranger and the latter enters into possession. Adverse possession by one cotenant is possession of all. . . .

A tenant in common in possession is presumed to hold in the right of his cotenants, as well as himself, until notice is brought home to them of an intention to disseise them. In order to rebut this presumption and make such possession adverse it must be shown that the possession was with the intent to hold adversely and such intent must be indicated by acts calculated to exclude the cotenants. . . .

Several cases have been decided by the Utah Supreme Court involving adverse possession as between cotenants. Most all of them cite the case of *McCready v. Fredericksen*, 41 Utah 388, 126 Pac. 316 (1912), as the one establishing the rule in Utah. The *McCready* case states the rule in Utah to be the same as that quoted therein from *Elder v. McClaskey*, 70 Fed. 529, 542 (6th Cir.):

Where one enters avowedly as tenant in common with others, his possession is the possession of those others, so long as the tenancy in common

is not openly disavowed. Before adverse possession by one tenant in common against another can begin, the one in possession must, by acts of the most open and notorious character, clearly show to the world, and to all having occasion to observe the condition and occupancy of the property, that his possession is intended to exclude, and does exclude, the rights of his cotenant. It is not necessary for him to give actual notice of this ouster or disseising of his cotenant to him. He must, in the language of the authorities, 'bring it home' to his cotenant. But he may do this by conduct, the implication of which cannot escape the notice of the world about him, or of any one, though not a resident in the neighborhood, who has an interest in the property, and exercises that degree of attention in respect to what is his that the law presumes in every owner.

The *McCready* case considered whether the acts of fencing and planting a plot of ground, together with payment of taxes for the statutory period, were sufficient to give title by adverse possession to one cotenant against another. The court stated at 41 Utah 396-97:

. . . it must be remembered that the possession, and even the use, by one cotenant of premises is always presumed to be the possession of all. Moreover, that any act of his which is calculated to protect the property against a lien, or sale, or otherwise, will also be presumed to be for the benefit of his cotenants; and this presumption prevails until the contrary is clearly made to appear . . . we are clearly of the opinion that under the great weight of authority the acts of [the cotenant in possession] . . . were clearly insufficient to constitute an ouster of his cotenant. . . .

The earlier case of *Smith v. North Canyon Water Co.*, 16 Utah 194, 52 Pac. 283 (1898), also indicated the difficulty one has in adversing his cotenant. In that case one of the defendants had used water rights and paid taxes and fees thereon for a number of years, yet the court held that he had not acquired title to the water shares by adverse possession, stating at page 200:

The possession of one tenant in common is the possession of all his cotenants. There is no element of hostility in such possession, and an adverse holding will not operate as an ouster, and set the statute of limitations running, until the tenant out of possession has some notice of such adverse holding. Such possession cannot be considered adverse, unless there is an actual ouster or some equivalent act showing the intent or act of exclusion.

Another case involving title to water stock states in even stronger terms the necessity of an ouster and repudiation in order to establish title by adverse possession. In that case, *Rasmussen v. Sevier Valley Canal Co.*, 48 Utah 490, 494, 160 Pac. 444 (1916), water stock descended to the heirs of the owner as tenants in common but one son took possession of it and for fourteen years "had the exclusive use of the water, paid all the taxes and assessments on the stock, voted it at stockholders' meetings, and in so doing was recognized by the company as the owner. We do not think that is sufficient to establish an outster (sic) and repudiation by one cotenant against other cotenants."

The more recent case of *Sperry v. Tolley*, 114 Utah 312, 199 P.2d 546 (1948), held that the acts of dividing, fencing, separately using without accounting for profits or expenses, improving the buildings on the land, and even the purchasing of a tax title in the name of one cotenant, were not sufficient to constitute adverse possession. The court considered all of this as consistent with possession as a tenant in common, and cited the *McCready* case as holding "that any act done by a cotenant for the protection of the common property, will be presumed to be for the benefit of all tenants and the presumption prevails until the contrary is clearly made to appear." See also *Walker v. Walker*, 17 Utah 2d 53, 404 P.2d 253, 256 (1965); *Webster v. Knop*, 6 Utah 2d 273, 312 P.2d 557, 560 (1957).

The most recent case decided by this court concerning the question of adverse possession against a cotenant is *Heiselt v. Heiselt*, 10 Utah 2d 126, 349 P.2d 175 (1960). That case held that the exclusive possession and payment of taxes for thirteen years plus the making of extensive improvements at a cost of over \$4,000.00 were not sufficient to constitute adverse possession.

. . . the repairs and improvements were such as a person in possession would make for one's own convenience and satisfaction and would not necessarily show an intent to oust cotenants of their rights or rebut the presumption that they were made for the benefit of all the cotenants.

The court once again cited the *McCready* case to the effect that

... in order for a tenant to adverse his cotenant he must "bring it home" to his cotenant and by the most open and notorious acts show to the world that "his possession is intended to exclude, and does exclude, the rights of his cotenant."

The foregoing cases have established a rule in Utah that makes adverse possession against a cotenant extremely difficult short of actual ouster of the cotenant or express repudiation of the cotenant's title. Only one case has been found in which adverse possession against a cotenant has been successful. The decision in that case, *Mathews v. Baker*, 47 Utah 532, 155 Pac. 427 (1916), was based upon extraordinary facts. These facts were quoted by the court from the lower court's findings as follows:

... the plaintiff ... has been in the continuous, open, public, and adverse possession of the above described real estate and has paid all the taxes and assessments levied against said property continuously since 1886 under claim of title; and that she has used and occupied said premises continuously since 1889 and made valuable improvements thereon of the approximate value of \$12,000, consisting of a five-room cottage of the value of \$3,000, one eight-room cottage of the value of \$5,000, one seven-room house of the value of \$3,000; and that she has expended the sum of \$1,000 in leveling the surface of said ground; that she built walks, planted shrubbery, constructed outbuildings for the convenient use of the occupants of said premises; and that during said period of time when she made all of said improvements and expended said money and labor she was occupying, holding and using said premises

openly, continuously, publicly and adversely against all persons whomsoever and against the claims of all the defendants herein. . . .

Obviously, the extensive improvements made by the plaintiff in the *Mathews* case were the reason for the Court's decision in favor of the plaintiff. Just as obviously, the facts of the case now before the court are not sufficient to constitute notice to appellants that respondents were attempting to assert title against them by adverse possession. The only acts of respondents herein that might give any kind of notice to appellants were the fencing, plowing, planting and grazing of the common land. These acts were held insufficient in the *McCready*, *Sperry* and *Heiselt* cases discussed *supra*. Moreover, the *Sperry* and *Heiselt* cases also involved the making of substantial improvements on the property and nevertheless held that adverse possession had not been established. No improvements of any kind were ever made upon the property in the instant case and therefore adverse possession has not been established a fortiori.

Respondents' possession of the property, payment of taxes thereon and all of their acts with respect to it were consistent with their right as tenants in common to possess and use the whole undivided property. The presumption that all of this was done for the benefit of their cotenants has not been overcome in this case.

A thorough discussion of adverse possession as between cotenants appears in Annot., 82 A.L.R.2d 5 (1962). The author of that lengthy annotation, after examining

the more than 1100 cases cited therein, concludes at pages 23-24 that a cotenant may gain title by adverse possession against his cotenant but to do so

. . . he 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 cotenant or cotenants had knowledge or notice of that fact. . . .

POINT II.

THE AGREEMENT OF APPELLANT TO ALLOW HIS COTENANT TO POSSESS THE PROPERTY PRECLUDES THE ASSERTION OF TITLE BY ADVERSE POSSESSION.

The discussion to this point has assumed that there was no agreement between the cotenants as to who would have possession of the property. In other words, if respondents had gone into exclusive possession of the property without permission of appellants and with the intent of obtaining title by adverse possession against appellants, their actions with respect to the property were not sufficient to put appellants on notice of their intent. Therefore, the fact that respondents went into possession of the property with appellants' express permission and pursuant to an agreement allowing them to

do so, makes appellants' case against adverse possession an even stronger one. Moreover, it is appellants' contention that the agreement precludes respondents' assertion of title by adverse possession. From the very nature of the agreement respondents' possession was not adverse. It was even more than permissive. It was actually a landlord-tenant relationship whereunder, for a consideration, exclusive possession was given to one cotenant by the other. Clearly, under these circumstances, there can be no claim of adverse possession.

That such a landlord-tenant relationship can be created between cotenants is supported by 4 THOMPSON, REAL PROPERTY § 1801, at 140 (1961 repl.), stating that "... the relationship of landlord and tenant may be created between cotenants involving the passing of exclusive possession to one cotenant." The agreement between Pender and Ehlers created such a relationship and adverse possession cannot run in favor of a tenant and against his landlord without notice of such adverse holding being brought home to the landlord. 3 AM. JUR. 2d *Adverse Possession* § 166 (1962).

The fact that respondents had no knowledge of the agreement between Pender and Ehlers did not relieve them of the burden of that agreement. As grantees of Pender, they stepped into his shoes and obtained no greater rights to the property than he had. In support

of this 4 THOMPSON, REAL PROPERTY § 1798, at 127 (1961 repl.), states that "one tenant in common cannot convey his interest in a portion of the property held in common to the prejudice of his cotenants, and the grantee of one of the cotenants steps into the shoes of his grantor, subject to all the rights of the other cotenants and their successors."

It is significant that respondents in this case obtained their interest in the property by quitclaim deeds, which convey only the "right, title, interest and estate of the grantor" and cannot be relied upon as conveyances of actual title to the property. UTAH CODE ANN. § 57-1-13 (1953). Cases have made a distinction between a conveyance by one cotenant to a stranger by warranty deed and by quitclaim deed. If the stranger takes by warranty deed, he has color of title upon which to base his adverse holding. But if he takes by quitclaim deed, he does not. 4 THOMPSON, REAL PROPERTY § 1812, at 26 (Supp. 1962) Moreover, respondents did not think that the quitclaim deeds gave them color of title as against appellants. They recognized appellants' interest in the property and, by their offer to purchase appellants' interest after receiving the quitclaim deeds, indicated they were not at that time attempting to hold adversely to them.

Appellant made no attempt to interfere with respondents' possession of the property quite obviously for two reasons. First, he was relying on the agreement he had made with Pender. Second, he was aware that the surest way to convert his, and respondents', tax title into fee title was to hold adversely to the fee title holders and to pay taxes on the property for the statutory period. Respondents were in possession for appellants as well as themselves since the possession of one cotenant is the possession of all. One purpose of the agreement between Pender and Ehlers was to start the adverse possession statute running against the fee title holders. Another purpose was to make certain that one of the cotenants would pay the taxes each year. Ehlers checked the tax records each year to be sure that this part of the agreement had been fulfilled. Since he found that the taxes had been paid each year, he could only assume that Pender had told respondents of his agreement with Ehlers and that they were possessing the property pursuant to that agreement. Without some kind of notice to appellants that respondents claimed the property as their own, repudiating appellants' title, there can be no claim of adverse possession.

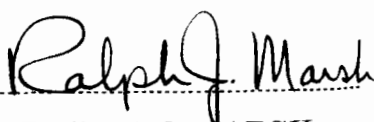
CONCLUSION

Under the decided cases in this country and, more particularly, under the decided cases in the State of Utah, respondents have not brought home to appellants

that they were attempting to hold adversely to them. Fencing, plowing, planting and grazing are acts that have been held insufficient to put a cotenant on notice of an adverse holding. Instead they are entirely consistent with holding as tenants in common. Moreover, the agreement of appellants to allow their cotenants to possess the property exclusively for payment of taxes precludes any assertion of an adverse holding. Rather the holding was permissive. This permissive holding continued due to the lack of any express notice to appellants or of acts by respondents that would unquestionably put appellants on notice. Therefore, the lower court's decision should be reversed and the case remanded for an accounting and for partition.

Respectfully submitted,

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