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HE DIED INTESTATE AND,

By

JOHN WOODCOCK, JR.*

"Well, you see he died intestate and, of course—," but a vendor of real estate never does see. He has either been in possession of this land for twenty-one years or more, or he has rented it for a like period and kept all of the rent. Now, some smart lawyer starts telling him that he has only an undivided one-third interest in the premises because there were two other heirs, whom he has neither seen nor heard from in lo these many years, and that his deed to the premises is not acceptable. That, in brief, is the problem raised by the fact that the heirs take under the intestate law as tenants in common. It is a problem which, although not a frequent one, is one which occurs often enough to merit some discussion.

The rule of law which has placed our unhappy heir in this position is that when a tenant in common enters into possession of premises exclusively he has entered into the possession presumptively for the benefit of all of the tenants. The solution of this problem raises three questions: First, may a tenant in common acquire title to the entire estate by adverse possession? Second, if he may, is his title so acquired a marketable title, and third, if not, what can be done in Pennsylvania to straighten out such a predicament?

The presumption noted above is the first stumbling block. In order to acquire title by adverse possession there must be open, notorious and hostile possession for the statutory period. This means that the burden of proof which rests on the person asserting adverse possession when that person is a tenant in common is much greater than it is in other cases. In the ordinary case the possession is presumed to be adverse if had for the statutory period, and it is incumbent upon the party claiming otherwise to show that the possession was not adverse, but was permissive. A tenant in common, however, must establish the fact that his use was adverse.¹ If the tenant in common is able to show an actual ouster of the other tenant, then the statutory period will begin to run,² but, in our case, an actual ouster is out of the question. Our heir has only vaguely heard of these two folks out in the west somewhere. The Pennsylvania cases have, however, made this problem one that is not insurmountable. In *Law v. Patterson*³ the court stated, "A man might come in by a rightful possession, and yet hold over adversely in the title. If he does so, such holding over, under circumstances will be equivalent to an actual ouster. ———In order

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¹ *Hanley v. Steward*, 155 Pa. Super. 535, 39 A.2d 323 (1944); *Smith v. Kingsley*, 331 Pa. 10, 200 A. 11 (1938).

² *Keyser v. Evans*, 30 Pa. 507 (1858); *Conneaut Lake Park Inc. v. Klinginsmith*, 362 Pa. 592, 66 A.2d 88 (1949).

³ 1 W. & S. 184 (1841).

to prove that one tenant in common has claimed the whole exclusively, it is not requisite that he should be proved to have made an expressed declaration to that effect; for it may be shown as clearly from his actions as from his words. For this purpose it will be sufficient to show that he entered upon the whole of the land, and took possession thereof, as if it had been his own exclusively; and that he has continued to occupy the whole, either by himself or his tenants, and to receive the whole of the rents, issues, and profits arising from the same, for twenty-one years, without having accounted to his co-tenant for any portion thereof, or any demand being shown to have been made upon him to do so, or evidence given of his having acknowledged the claim of his co-tenant."

It is true that he has a presumption to overcome, but as was said in the case of *Smith v. Kingsley*,⁴ "The presumption that one co-tenant holds possession of property for the benefit of all of his co-tenants has no more force than any other kind of presumption. As we said in *Watkins v. Prudential Ins. Co.* 315 Pa. 497, 173 A. 644: 'Presumptions are not evidence and should not be substituted for evidence. No presumption can be evidence; it is a rule about the duty of producing evidence. Presumptions are not fact suppliers; they are guide posts indicating whence proof must come.'" The *Smith* case is one of the most recent cases in which a tenant in common has acquired title by adverse possession as against his co-tenant. In that case one of the co-tenants had leased the coal rights in certain premises, reserving for himself the right to take out coal for his own benefit. The lease was made in 1828 and was to last one hundred years. At its expiration heirs of the other tenants contended that when the lease was made it was presumptively for the benefit of their ancestors and that, therefore, when the lease expired they retained an interest in the coal. The court found, however, that the giving of the lease was an actual ouster, and that these heirs were barred by the running of the statute. The giving of a deed by one tenant is an ouster of the other tenants.⁵ However, that is the very thing that our man cannot do, for the vendee has refused to accept his deed. It is necessary for him to prove adverse possession so that he may tender a good, marketable deed. And the important fact to our problem is that such adverse possession can be proved not only by showing an actual ouster of the co-tenants for twenty-one years or more but also by introducing evidence showing positive and unequivocal acts amounting to a claim of the whole property as exclusively his, brought home to the co-heirs and co-tenants twenty-one years or more and maintained without interruption.⁶

Providing such facts are available the next problem which faces the approval of this title is this: Is such a title marketable, for it is a well established rule of law that the vendee to a contract for the sale of real estate need not accept the deed or pay the purchase price upon tender of the deed if the title to the premises is

⁴ 331 Pa. 10, 200 A. 11 (1938).

⁵ *Culler v. Motzer*, 13 S. & R. 355 (1825); *Earl v. D. L. & W. Railroad Company*, 270 Pa. 152, 113 A. 196 (1921).

⁶ n. 1.

not marketable. A glance at the cases on this point would seem to indicate that the answer is in the affirmative, for in *Medusa Portland Cement Company v. Lamantina*,⁷ the court stated, "It is a familiar principal of the law of real estate that a title depending on adverse possession may constitute not only a good but a marketable title which a purchaser will be compelled to accept." Other Pennsylvania cases bolster this position.⁸ However, an examination of these cases will reveal that, in all of them, the facts establishing adverse possession were definite and provable and that the case of *Hoover v. Pontz*⁹ more correctly states the law. It is there stated that a court should not declare a title marketable if there be a color of an outstanding title which may prove substantial. If the purchaser runs the hazard of litigation in the future a court should not declare a title marketable. As the court says, "It is undoubtedly true, a good title may be acquired by adverse possession and in exceptional cases, a marketable title, which a purchaser may be required to accept. The instances in which it may be compelled are rare, however, because proof of open, notorious, continuous, visible, and hostile possession necessarily rest in parol and 'where the title depends on the existence of a fact which is not a matter of record, and the fact depends for its proof entirely on oral evidence, the case must be made very clear by the vendor to warrant the court in ordering specific performance.'"¹⁰

The court in the *Hoover* case refused to grant specific performance. Instead the court suggested that the vendor ought to use the means then given him by the legislature¹¹ to clear his title before they would force the vendee to accept it. This suggestion made by this case is one which should find favor in our case. A tenant in common has, it seems, an additional burden of proof when he claims the whole of the estate through adverse possession, and it seems that his title would not be marketable when he himself is trying to sell the whole premises unless he has first used the means given him in Pennsylvania by the Action to Quiet Title. Once he has used this means his title will be marketable. In *American Jurisprudence*¹² it is said, "a marketable title may be based on a judicial sale or decree quieting the title, providing the proceedings were regular and all persons in interest were parties thereto so as to be bound thereby." The important feature, and the one to be watched is that of making all parties in interest parties to the suit, for, "when the vendor's title depends upon the validity of the judicial proceedings and a defect rendering the title doubtful is apparent from the record of the proceedings the vendee need go no further than merely pointing it out; but if, on the other hand, the defect depends upon extrinsic facts to overcome any presumption as to the regularity of the proceedings he must produce evidence to establish his claim in

⁷ 353 Pa. 53, 44 A.2d 244 (1945).

⁸ See *Westfall v. Washlagel*, 200 Pa. 181 (1901); *Dallmeyer v. Ferguson*, 198 Pa. 288 (1901); *Pratt v. Eby*, 67 Pa. 396 (1871).

⁹ 271 Pa. 285, 114 A. 522 (1921).

¹⁰ *Ibid.*, page 288.

¹¹ At that time the Act of April 18, 1905, P.L. 202, or by means of a Bill *Quia Timet*.

¹² 55 AM. JUR. 678-680, § 220.

this regard." However, in this regard, the power of a court to make a decree concerning land must be distinguished from questions as to errors respecting facts or law going to the merits of the issue presented. An error respecting these latter matters does not affect the jurisdiction of the court and the title of the vendor is marketable.¹³

The Action to Quiet Title is, in Pennsylvania today, the proper method for our heir to follow. He is in possession and there is a definite cloud on his title. This action is at least an action *quasi-in-rem* to determine interests in property and the judgment will be conclusive upon those persons named as defendants. As is stated in the *Restatement, Judgments*,¹⁴ "Where in a proceeding *quasi-in-rem* to determine interests in property a competent court has, after proper notice to the defendant, determined the interests in the property as between the plaintiff and the defendant, and the Court has jurisdiction over the property, the judgment is binding upon the defendant with respect to the property although the defendant was not personally subject to the jurisdiction of the Court." Since, in a case of this kind, where the defendants are known but their whereabouts is unknown, the legislature has allowed service by publication, our heir will not be put to any great expense in getting proper notice to the defendants and the title which he obtains, based upon the court decree, is a marketable title which the vendee must accept.

It would seem, then, that the procedure outlined above provides a simple, rather inexpensive method by which titles encumbered by 'missing' heirs can be made whole. There is no reason for anyone to question such a title. The rules of service provided by the Action to Quiet Title make the task an easier one, but they do not lessen the finality of the final decree. The Intestate Act of 1947 is another aid in this problem for it decreases the possible number of heirs. It is true that the heirs will still take as tenants in common, but it is also true that that fact should no longer rise and present an insurmountable barrier to a man who has thought all along that the whole property was his.

¹³ Holmes v. Woods, 168 Pa. 530 (1895).

¹⁴ Page 338, § 75.