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Real Property - Adverse Possession - Between Cotenants

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REAL PROPERTY—ADVERSE POSSESSION—BETWEEN COTENANTS—C. V. James and his wife and children owned certain property as tenants in common. In 1931 defendant Fallon recovered a judgment against C. V. James, and the land was sold by a sheriff under execution. Fallon became the purchaser at the sheriff's sale and was issued a sheriff's deed purporting to convey the entire interest in the property. Thereafter he was "in the actual, visible, distant, hostile, exclusive, continuous and uninterrupted possession" of the land and paid all taxes thereon. Plaintiffs, the wife and children of James, brought this action to determine the ownership of the property. Fallon claimed title by adverse possession under an eighteen-year statute of limitations. The lower court held that the plaintiffs, as tenants in common, were the owners of a $\frac{1}{4}$ interest in the land and that defendant had claim only to the $\frac{3}{4}$ interest formerly owned by the judgment debtor. On appeal, *held*, affirmed. The sheriff's deed passed to defendant only such interest as was owned by the judgment debtor, making him a tenant in common with plaintiffs. The statute of limitations does not begin to run against cotenants until an "ouster" of the cotenants has been established, and under the facts presented Fallon

did nothing amounting to an "ouster." *Fallon v. Davidson*, (Colo. 1958) 320 P. (2d) 976.

Since each cotenant is entitled to possession of commonly owned property, as a general rule possession by one is, in law, possession by all.¹ As between cotenants, though the usual elements of adverse possession are present, this will ordinarily preclude the acquisition of title by adverse possession unless and until there has been an "ouster" of the other cotenants.² It is everywhere admitted that an actual "turning out by the heels" is not a necessary element of "ouster," but beyond this negative approach the courts have not framed an exact definition of the word. In cases involving title disputes between original cotenants, the courts require the cotenant in possession to give the cotenants out of possession notice of his intent to claim adversely.³ In cases where a third-party grantee in a deed from one of the original cotenants is in possession, courts generally make a distinction on the basis of the wording of the deed under which he claims. Where the deed purports to convey only the cotenant grantor's interest, actual notice of the adverse claim must be given.⁴ When the deed purports to convey the entire interest in the land,⁵ however, the courts are predisposed to hold that the statute of limitations has run.⁶ Some courts completely do away with the notice requirement,⁷ while others retain it but infer such notice either from

¹ See 4 TIFFANY, REAL PROPERTY, 3d ed., §1185 (1939); 3 AMERICAN LAW OF PROPERTY §15.7 (1952).

² *Commodores Point Terminal Co. v. Hudnall*, (S.D. Fla. 1925) 3 F. (2d) 841 at 844: "As I understand the law, this rule applies in all cases except where the possession of the cotenant is such as to amount to an ouster." See 21 MISS. L. J. 147 (1949).

³ Most courts require actual notice to be given. See 10 TEX. L. REV. 336 (1932). Some courts have allowed a jury to infer notice from the sole and uninterrupted possession of the property continued for many years without interference or claim by the cotenants out of possession. *Singer v. Naron*, 99 Ark. 446, 138 S.W. 958 (1911). The notice requirement also prevails in cases where one of the original cotenants is claiming under a deed purporting to convey the entire interest in the property but which in fact does not convey the interests of cotenants out of possession. *Rose v. Roso*, 119 Colo. 473, 204 P. (2d) 1075 (1949). One case held, however, that the recording of such deed gave constructive notice of the adverse claim and thereby started the statute of limitations running. *Ames v. Howes*, 13 Idaho 756, 93 P. 35 (1907).

⁴ *Holley v. Hawley*, 39 Vt. 525 (1867); *Keeler v. McNeir*, 184 Okla. 244, 86 P. (2d) 1004 (1939).

⁵ Most courts have not distinguished between a quit claim deed and a warranty deed where both purport to convey the entire interest in the property. *Lucas v. Crofoot*, 95 Conn. 619, 112 A. 165 (1921); *Thurmond v. Espalin*, 50 N.M. 109, 171 P. (2d) 325 (1946). A few have felt, however, that the very nature of a quit claim deed precludes it from purporting to convey more than the grantor had. *Cook v. Rochford*, (Fla. 1952) 60 S. (2d) 531; 32 A.L.R. (2d) 1210 (1953).

⁶ See 32 A.L.R. (2d) 1214 (1953).

⁷ Some courts have indicated that exclusive possession by a third party grantee claiming under a deed from an original cotenant amounts to "ouster" per se. *Commodores Point Terminal Co. v. Hudnall*, note 2 supra; *Whittington v. Cameron*, 385 Ill. 99, 52 N.E. (2d) 134 (1943); *Smith v. Lemp*, 31 Del. Ch. 1, 63 A. (2d) 169 (1949). See 150 A.L.R. 551 (1944). Other courts have treated such a grantee as a stranger rather

mere possession by the new grantee⁸ or from the recording of the deed under which the grantee claims.⁹ This change in judicial attitude has no doubt resulted from concern for the third-party cotenant who has occupied the land under a mistaken belief of sole ownership. A diligent search of the grantor's title, however, would result in a discovery of the cotenancy; and by giving such a grantee cotenant special treatment, the courts are putting a premium on lack of good faith effort. Since the innocent cotenants out of possession should have a right to assume that the cotenant in possession is claiming only his interest in the cotenancy, the language of the deed under which the possessor claims should have no bearing on whether or not the statute of limitations has started to run. It would seem, therefore, that as between all cotenants notice of the adverse claim should be one of the necessary elements of adverse possession. Rather than require such notice in all situations, however, the court in the principal case preferred to draw a distinction between a case in which a grantee claims under a sheriff's deed and one in which a grantee claims under a deed voluntarily executed by a grantor cotenant. It was indicated that whereas the voluntary execution of a deed by a cotenant grantor purporting to convey the entire interest in property might well be held an "ouster," the requirement of notice prevails in cases where the grantee claims under a sheriff's deed. Thus, the creditor's rights in the conveyed land would depend on whether the debtor conveyed it voluntarily in payment of the debt, or whether he forced the creditor to obtain it at execution sale. The majority of courts have not made this distinction, but hold that a foreclosure proceeding, judgment, and deed purporting to convey the entire property, followed by actual and exclusive possession by the purchaser starts the statute of limitations running.¹⁰ Since it is the grantee cotenant who is claiming title adversely, his acts, rather than those of the original cotenant in determin-

than a cotenant and have thus eliminated the "ouster" requirement entirely. *Joyce v. Dyer*, 189 Mass. 64, 75 N.E. 81 (1905); *Elsheimer v. Parker Bank and Trust Co.*, 237 Ala. 24, 185 S. 385 (1938).

⁸ *Gardner v. Hinton*, 86 Miss. 604, 38 S. 779 (1905); *Witherspoon v. Brummett*, 50 N.M. 303, 176 P. (2d) 187 (1946). *Contra*, *Fordson Coal Co. v. Vanover*, 291 Ky. 447, 164 S.W. (2d) 966 (1942).

⁹ *May v. Chesapeake & Ohio Ry. Co.*, 184 Ky. 493, 212 S.W. 131 (1919); *Farmers State Bank v. Lanning*, 162 Kan. 95, 174 P. (2d) 69 (1946); *Parr v. Ratisseau*, (Tex. Civ. App. 1951) 236 S.W. (2d) 503. *Contra*, *West v. Evans*, 29 Cal. (2d) 414, 175 P. (2d) 219 (1946).

¹⁰ *Hopson v. Fowlkes*, 92 Tenn. 697 (1893); *Cox v. Tompkinson*, 39 Wash. 70, 80 P. 1005 (1905); *Bradshaw v. Holmes*, (Tex. Civ. App. 1951) 246 S.W. (2d) 296. *Contra*, *Curtis v. Barber*, 131 Iowa 400, 108 N.W. 755 (1906). See *John L. Roper Lumber Co. v. Richmond Cedar Works*, 165 N.C. 83, 80 S.E. 982 (1914), where it was held that a grantee claiming under a cotenant's deed purporting to convey the entire interest in land could acquire full title only after twenty years of adverse possession, while allowing a grantee claiming under a sheriff's deed describing the property in the same manner to acquire such title after only seven years of adverse possession.

ing through what procedure the creditor gets title, should be, and are in most courts, of primary importance in determining whether or not there was an "ouster." Policywise there appears to be no basis for distinguishing between a grantee claiming under a sheriff's deed and one claiming under a voluntary conveyance by a cotenant. While it is true that one claiming under the sheriff's deed should realize that he could acquire no greater interest than that of the judgment debtor,¹¹ a grantee claiming under a deed executed by a cotenant should realize that he could acquire no greater interest than that of his grantor.¹² Consequently, each should be required to "oust" his other cotenants, for in each case a diligent search of his chain of title would reveal the cotenancy.

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¹¹ Reagan v. Dick, 88 Colo. 122, 293 P. 333 (1930).

¹² Hardman v. Brown, 77 W.Va. 478, 88 S.E. 1016 (1916).