

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON

ROBERT HATFIELD,

Appellant,

v.

No. 35128

VERNON E. THOMPSON, HEIRS OF EDITH VANCE ADKINS [RAY VANCE, PAULINE VANCE ADKINS, LOUISE VANCE MURPHY, ROMIE VANCE, and NANCY VANCE BREADON] and CARMIE VANCE [deceased with heirs unascertained: MABEL GRIMMET VANCE (widow), THREE UNKNOWN CHILDREN (children with widow), GENEVA VANCE PAULUS (first wife) DENCIL LEE VANCE (son with first wife) and PATRICIA JUNE VANCE BUTLER (daughter with first wife)],

Appellees.

From the Circuit Court of Cabell County, West Virginia

██████████ BRIEF OF APPELLEE

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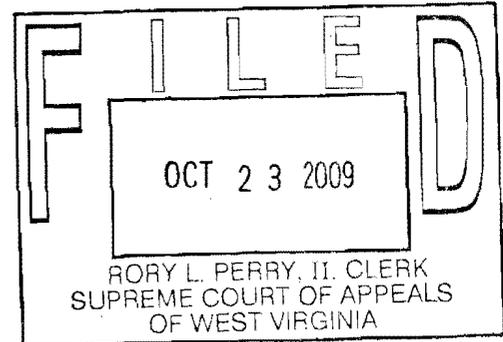


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VANCE ADKINS [RAY VANCE, PAULINE
VANCE ADKINS, LOUISE VANCE MURPHY,
ROMIE VANCE, and NANCY VANCE
BREADON] and CARMIE VANCE [deceased
with heirs unascertained: MABEL GRIMMET
VANCE (widow), THREE UNKNOWN CHILDREN
(children with widow), GENEVA VANCE PAULUS
(first wife) DENCIL LEE VANCE (son with first
wife) and PATRICIA JUNE VANCE BUTLER
(daughter with first wife)],

Appellees.

RESPONDENT'S REPLY BRIEF

Now comes the Respondent, Vernon E. Thompson, pursuant to Rule 4 of the West Virginia Rules of Appellate Procedure, and for Response to the Petitioner's Brief herein filed, responds and states as follows:

I

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The Circuit Court of Cabell County entered a final ORDER December 29, 2008, in a partition suit on land brought by Respondent Vernon Thompson and in favor of Mr. Thompson. Plaintiff Thompson and Defendant Robert Hatfield both brought Motions for summary judgment on the facts elicited in Court. Both Motions were dismissed in the said final ORDER, which see. The Court ruled based upon the merits of the case, factual

evidence elicited at several hearings, briefs filed by Thompson and Hatfield, and upon the law of the case as seen in said briefs.

II

FACTS OF THE CASE

CHAIN OF TITLE TO SUBJECT REAL ESTATE

Please see the Plaintiff, Vernon E. Thompson's, second amended complaint plus, his BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OF MOTION TO EXTEND DISCOVERY filed below. Both documents trace the ownership of the land in question back to ancestors, predecessors in title, common to both Plaintiff and Defendant. These ancestors are Thomas Hatfield and Nancy Hatfield. This case involves heirship land and intestate succession.

The history or chain of title as to the property cited in Plaintiff's Complaint is as follows:

Thomas Hatfield acquired the property in question by two separate deeds, which together gave him forty-two (42) acres as follows:

A. A deed of thirty (30) acres from Parish Adkins and Catharine Adkins, his wife, dated August 7, 1891, and recorded in the Office of the Clerk of the County Commission of Cabell County, Cabell County Courthouse, Huntington, West Virginia, in Deed Book 41, Page 492 (**Exhibit 1¹**).

B. A deed of twelve (12) acres of record in said Clerk's Office, dated January 18, 1905, in Deed Book 91, Page 363 (**Exhibit 2¹**).

Thomas Hatfield and his wife, Nancy Gue Hatfield, both died intestate, leaving seven (7) children:

1. Herbert Hatfield
2. Ben Hatfield
3. Shem Hatfield
4. Ode aka "Odie" Hatfield
5. Edith Hatfield
6. Ethel Hatfield
7. Lilly Hatfield

The property at issue in this case passed by intestate succession to these seven (7) children, giving each one an undivided one-seventh (1/7) interest.

Ode "Odie" Hatfield purchased the interests of Ben, Shem, and Lillie Hatfield, see Deed Book 203, Page 184, dated January 13, 1923 (**Exhibit 3¹**). Ode Hatfield then had an undivided four-seventh (4/7) interests.

Herbert Hatfield, one of the seven Hatfield siblings inherited a one-seventh (1/7) undivided interest by intestate succession as aforesaid, and then purchased Ethel Hatfield's (Dean's) one-seventh undivided interest from Ethel's only child and sole heir, Idona Hunt, see deed to Herbert Hatfield, (**Exhibit 4¹**). Said deed is dated March 12, 1982 and is of record at Deed Book 830, Page 564, in the aforesaid Clerk's Office. This gave Herbert Hatfield a two-seventh (2/7) undivided interest in the subject property.

Herbert Hatfield left his two-seventh (2/7) undivided interest and his entire estate, after debt and taxes, to his wife, Hazel Loraine Hatfield. See Herbert Hatfield's Will, (**Exhibit 5¹**), of record at Will Book 85, Page 99.

Hazel Loraine Hatfield, now deceased left her two-sevenths (2/7) interest by Will to her son, Vernon Thompson, plaintiff herein (**Exhibit 6¹**). Said Will is recorded at Will Book 165, Page 614 in the aforesaid Clerk's office.

An undivided one-seventh (1/7) interest was owned by Edith Hatfield (Vance). Edith Hatfield (Vance) died intestate leaving six (6) children surviving her as follows:

1. Nancy Vance (Breden)
2. Carmie Vance
3. Pauline Vance (Adkins)
4. Louise Vance (Murphy)
5. Romie Vance
6. Ray Vance

EDITH HATFIELD VANCE INTEREST

Please note that Edith Hatfield Vance, deceased, inherited a one-seventh (1/7) undivided interest in and to the subject property. Ms. Vance died intestate leaving six (6) children as seen above.

These parties, each and everyone, were served with process in this case by publication, in person, or by certified mail. See the record below.

Mr. Thompson claims no interest in this one-seventh (1/7) interest. Some of Ms. Vance's children have ceded their interest to Robert Hatfield, and, apparently Judge Cummings allotted this said one-seventh (1/7) interest to Robert Hatfield. Vernon Thompson does not object. At any rate, the Circuit Court's Order impliedly merged Ms. Vance's interest with that of Mr. Robert Hatfield, increasing his undivided four sevenths (4/7) interest to a five seventh (5/7) interest. Since the Vance children did not appear below, their one-seventh interest is apparently extinguished by the Circuit Court's Order as aforesaid.

Defendant, Robert Hatfield and Frances M. Hatfield, his wife, purchased the interests of Ode "Odie" Hatfield by deed of record in the aforesaid Clerk's Office at Deed Book 681, Page 518, dated the 23rd day of October, 1969, **Exhibit 7¹**, and by deed dated the 18th day of July 1973, **Exhibit 8¹**, recorded at Deed Book 731, Page 243. This gave defendant, Robert Hatfield, a four-sevenths (4/7) undivided interest, by purchase.

Herbert Hatfield by his attorney, William N. Matthews, offered to join in a mineral lease of the subject property with Robert Hatfield on April 14, 1982, see letter, **Exhibit 9¹**.

Robert Hatfield was to attempt to obtain the interests of Edith Vance heirs per letter of the said William N. Matthews, dated June 15, 1982, **Exhibit 10¹**.

According to a letter from Attorney Matthews, **Exhibit 11¹**, dated February 19, 1982, the said Odie Hatfield purchased the interests of Shem Hatfield and wife, Bennie Hatfield and wife, and Lillie Hatfield Cremeans and husband by deed of record at Deed Book 203, Page 184, Exhibit 3, id. See Matthews letter, Exhibit 11.

Plaintiff, Vernon E. Thompson, testified that defendant, Robert Hatfield, offered to purchase plaintiff's two-seventh (2/7) interest from his mother, Hazel Loraine Thompson Hatfield, who had inherited this interest from her husband Herbert Hatfield as stated in Plaintiff's Complaint herein filed. Plaintiff testified that defendant attempted to purchase the Edith Hatfield Vance heirs ownership. Edith Hatfield Vance heirs (page 2 hereof) will confirm efforts by defendant to purchase their undivided interests in the subject property, see Plaintiff's complaint filed herein.

Robert Hatfield's attorney, Jason A. Poling, furnished the undersigned a copy of a title opinion letter authored by The Honorable David M. Pancake, Judge of the Circuit Court of Cabell County, **Exhibit 12¹**. This was done before Judge Pancake became a circuit judge, and is dated October 11, 1973. This title opinion letter is incorrect based upon the deeds hereto from the Office of the Clerk of the County Commission, Cabell County Courthouse, Huntington, West Virginia. See Exhibits 1, 2, 3, 4, 7 and 8 as aforesaid. These clearly show defendants' ownership of a four-seventh (4/7) undivided interest in the aforesaid property; plaintiffs ownership of a two-seventh (2/7) interest in the same, and ownership of a one-seventh (1/7) interest by the estate of Edith Hatfield Vance, deceased.

In summary, Cabell County records show the following ownership, undivided interests, of the property in question:

1. Robert Hatfield.....four-seventh (4/7).
2. Vernon E. Thompson.....two-seventh (2/7).
3. Edith Hatfield (Vance).....one-seventh (1/7).

¹ Please note that all references to Exhibits refer to the exhibits of record and attached to Plaintiff's above-referenced brief and filed in the Circuit Court.

FACTS OF THE CASE

ADVERSE POSSESSION

Defendant, Mr. Hatfield's evidence presented at hearings below does not establish any of the elements of adverse possession. Mr. Thompson's evidence likewise presented was that Mr. Thompson and his predecessors in title used the said property along with Mr. Hatfield without any idea that Mr. Hatfield was claiming the whole property. Mr. Hatfield purchased certain of the heirship interests from his relatives; Mr. Hatfield built his home on land contiguous to said property but not inside the property lines; Mr. Hatfield's home was built within a few feet of an existing roadway into said property.

The Circuit Court denied Mr. Hatfield's claim to adverse possession as well it should have.

III

ASSIGNMENTS OF ERROR

QUESTIONS PRESENTED BY PETITIONER

1. Whether The Summary Judgment Order of The Circuit Court Sets Forth Factual Findings Sufficient To Permit Meaningful Appellate Review.

The Court did not grant summary judgment to either party. See the Court's Order of December 29, 2008.

As to the facts alleged by both parties, these were rigorously developed in briefs and legal memoranda filed by both parties, Hatfield and Thompson. That the record below is replete with the facts, circumstances, and law of the case, as alleged through counsel by both parties and as elicited from the parties in Court.

A meaningful appellate review may be had by looking at the briefs and memoranda below as well as the transcripts of the several hearings held below.

2. Whether The Petitioner Robert Hatfield Is Entitled To Have His Adverse Possession Claim Considered By A Jury.

Both parties, in person and by Counsel, waived a jury trial as to the facts of this case by submitting this matter to the Judge of the Circuit Court for hearing on the merits. Extensive settlement negotiations were conducted by the parties and counsel both in Court before Judge John L. Cummings and out of Court by the parties and counsel. The parties were in agreement as to the general location for Mr. Thompson's two-seventh (2/7) portion of the land in question plus Mr. Hatfield's four-seventh (4/7) portion of said land.

The gravamen in the in Court negotiations and in the out of Court negotiations had to do with the survey costs for each party's parcel and for the costs of building a roadway to access the property.

Mr. Hatfield built his home within a few feet of the existing entryway and was concerned that Mr. Thompson's invitees would disturb Mr. Hatfield's home. Mr. Hatfield maintained that his right to use the old roadway was exclusive. Mr. Thompson maintained that said roadway was an ancient one used by the various owners of the property for many years.

Thus, the disagreement was as to costs of surveys and as to road construction costs. Both parties submitted these matters – all of them to Judge Cummings for decision. Thus, the parties waived any right each may have had to a jury trial.

As to Mr. Hatfield's allegations as to adverse possession, Mr. Hatfield purchased the three-sevenths (3/7) interest from the heirs of Thomas and Nancy Hatfield per the record below and per his Petition in the West Virginia Supreme Court. His holding of the whole of this land adverse to the claims of Mr. Thompson and Edith Vance never did exist. The Circuit Court's apportionment of the landed interests should stand. Mr. Hatfield's own behavior deny; deny his claim for adverse possession.

3. Whether Thompson Established That there Is No Genuine Issue Of Material Fact That He Is Entitled To A Two-Sevenths Interest And Robert Hatfield Is Entitled To A Five-Sevenths Interest In The Subject Real Estate.

There is no Genuine Issue of Material fact as to Mr. Thompson's ownership of an undivided two-sevenths (2/7) interest in the subject land. The deeds and wills cited above and attached as Exhibits to Mr. Thompson's Brief in Support Motion for Summary Judgment and of Motion to Extend Discovery are drawn from the Office of the Clerk of the Cabell County Commission, Cabell County Courthouse, Huntington, West Virginia.

These said instruments show that Mr. Thompson owns the said undivided two-sevenths interest. Please review these. See Page 2 of said Brief as well as pages 2 and 3 hereof.

Mr. Poling, counsel for Robert Hatfield, cites an earlier title opinion done by David M. Pancake, attorney, and one other "expert". Not one of these title opinions went back to the ownership of the subject property by Thomas Hatfield by deeds dated August 7, 1891, and a second deed dated January 18, 1905, as aforesaid.

A title opinion letter does not grant any interest whatsoever in land and is only as accurate as its author. In the instant case, the deeds and wills of record in the Court below speak for themselves. Mr. Thompson has an unbroken chain of title extending back to August 7, 1891 and January 18, 1905.

Mr. Poling and Mr. Thompson own their respective interests by intestate succession. Both Thomas Hatfield and Nancy Hatfield died intestate.

4. Assuming Arguendo That The Circuit Court Properly Determined The Respective Interests Of The Parties In The Subject Real Estate, Whether The Court's Summary Determination That The Subject Real Estate Should Be Surveyed And Divided In Kind, With The Costs Borne Proportionately, Is Proper.

The Circuit Court had the benefit of testimony of the parties, photographs of the land in question and time to maturely consider the lay of the land, the topography of it along with expressed interests of the parties, as the evidence of record shows.

In summary, the land in question generally lies atop a ridgeline, a plateau, as it were, gently rising from the vicinity of Mr. Hatfield's home to the crest of the plateau comprising most of the forty-two (42) acres in question. The land lends itself to partition in kind.

The costs of survey should be apportioned based upon the acreage allotted to each of the parties, that is, Five-Sevenths to Mr. Hatfield and Two-Sevenths to Mr. Thompson.

5. Assuming Arguendo That The Circuit Court Properly Determined The Respective Interests Of The Parties In The Subject Real Estate, Whether The Court's Summary Determination That Thompson Is Entitled To A Right-Of-Way By Necessity, With The Costs Associated With Establishment Of The Right-Of-Way Borne Proportionately, Is Proper.

Mr. Thompson is entitled to a right-of-way by necessity in order to access his portion of the property. Evidence presented in Circuit Court shows Mr. Hatfield constructed his home contiguous to the property in question but not on the said property. His home is within six (6) to ten (10) feet of the ancient roadway into and out of the land in question. For traffic to use this roadway will interfere with Mr. Hatfield's quiet enjoyment of his home.

But, Mr. Hatfield built his home in this location knowing full well its proximity to both the property line and to the old roadway.

Mr. Thompson has as much right to use the long established roadway as does Mr. Hatfield. The cost of building an alternative access road into the subject property should be born by Mr. Hatfield alone. Mr. Hatfield should also pay for a survey to establish the roadway and to fix its location across the contiguous land owned by Mr. Hatfield.

LAW OF THE CASE

ADVERSE POSSESSION

1. Statutes:

West Virginia Code Chapter 55, Article 2, Section 1: "No person shall make an entry on, or bring an action to recover, any land, but within ten years next after the time at which the right to make such entry or to bring such action shall have first accrued to himself or to some person through whom he claims". West's Annotated Code of West Virginia, Volume 29 (2002), hereinafter referred to as "Code, 55-2-1."

2. Case Law:

A. Somon v. Murphy Fabrication & Erection Co., 160 W.Va. 84, 232 S.E.2d 524 (1977): (Justice Miller) Syllabus Point 3: "One who seeks to assert title to a tract of land under the doctrine of adverse possession must prove each of the following elements for the requisite statutory period: (1) That he has held the

tract adversely or hostilely; (2) that the possess has been actual; (3) that it has been open and notorious (sometimes stated in the cases as visible and notorious); (4) that possession has been exclusive; (5) that possession has been continuous (6) that possession has been under claim of title or color of title.” (P 372 Michies Code, see 232 S.E.2d 526.

B. Brown v. Goble, 196 W.Va. 559, 474 S.E.2d 489 (1996), (Justice Franklin D. Cleckley):

- (1) “The burden is upon the party who claims title by adverse possession to prove by clear and convincing evidence all elements essential to such title.” Syllabus Point 2; see also headnote (6) Adverse Possession; and see 474 S.E.2d 489,493, 494, 495.
- (2) “Because of the weight to be given to evidence is peculiarly within the province of the trial court, it is the trial court and not this Court that draws the distinction between evidence which is clearly convincing and that which merely preponderates. However, the question whether the circuit court considered the proper material elements for adverse possession is a question of law, subject to our de novo (emphasis added) review.” 474 S.E.2d 496.

C. Brown v. Gobble, supra.

Beginning on page 498, Justice Cleckley discusses the elements of adverse possession as follows:

FN10. In Somon, 160 W.Va. at 91-92, 232 S.E.2d at 529, we distinguished claim of title and color of title as follows:

“A claim of title has generally been held to mean nothing more than that the disseisor enters upon the land with the intent to claim it as his own. Whereas, ‘color of title’ imports there is an instrument giving the appearance of title, but which instrument in point of law does not.” (Citations omitted.)

FN11. Not Applicable

FN12. “We have held that to establish ‘hostile’, or ‘adverse’ possession, evidence must be presented which shows that possession of disputed property was against the right of the true owner and is inconsistent with the title of the true owner for the entire requisite ten-year period.” See Somon v. Murphy Fabrication & Erection Co., supra 232 S.E.2d 529.

FN13. “We have held that to establish ‘actual’ possession, evidence must be presented which shows that possession of disputed property was used for enjoyment, cultivation, residence or improvements for the entire requisite ten-year period.” See Ketchum v. Spurlock, 34 W.Va. 597, 12 S.E. 832 (1891).

FN14. "We have held that to establish 'open and notorious' possession, evidence must be presented which shows that possession of disputed property was in such a manner as to give notice to the true owner that the property is being claimed by another for the entire requisite ten-year period." See Guthrie v. Beury, 82 W.Va. 443, 96 S.E. 514 (1918).

FN15. "We have held that to establish 'exclusive' possession, evidence must be presented which shows that possession of disputed property was used only by the occupant and others were not permitted to use it or claim ownership during the entire requisite ten-year period." See Lyons v. Fairmont Real Estate Co., 71 W.Va. 754, 77 S.E. 525 (1912).

FN16. "We have held that to establish 'continuous' possession, evidence must be presented which shows that possession of disputed property was enclosed, maintained or cultivated during the entire requisite ten-year period." See Wilson v. Braden, 56 W.Va. 372, 49 S.E. 409 (1904).

FN17. "We have held that to establish 'claim of title,' evidence must be presented which shows that possession of disputed property was claimed without actual title ownership by the occupant during the entire requisite ten-year period." See Somon v. Murphy Fabrication & Erection Co., supra.

ARGUMENT

The deeds and wills cited herein establish the heirship interests, undivided interests, in the whole of the subject property, ab initio, upon the death of Thomas Hatfield and Nancy Gue Hatfield, his wife. Said heirship ownership, the fee simple interest in said land, has remained the same to the present, the heirs having bought and sold undivided interests among themselves.

The defendant, Robert Hatfield, borrowed money against the said property based upon an erroneous title search from Mr. David M. Pancake, and, while this debt has probably long since been paid, this transaction was fraudulently induced by the defendant, who purchased some of the heirship interests, four-seventh's (4/7), knowing full-well that his uncle, Herbert Hatfield, held two-seventh's (2/7) interest and his aunt, Edith Vance a one-seventh (1/7) interest. See Plaintiff's brief cited herein.

Plaintiff, Vernon E. Thompson, maintains that since the ownership and the possession of the premises has been in said heirship from the beginning of the said heirship, defendant has no right of adverse possession.

Plaintiff states that defendant, Robert Hatfield, has not met any of the elements of adverse possession as shown above. This land should be divided by the Court as it is easily divisible per plaintiff's requests in the complaint filed herein.

Plaintiff states that the heirs and their progeny have used this land intermittently for recreational purposes; without any idea of a claim by Robert Hatfield.

Defendant has clearly purchased some heirship interests, but not all of the heirship interests, an admission against interest and an estoppel as to any adverse claim he may have.

In short, Plaintiff states that defendant's claim of adverse possession was an afterthought once suit was filed by plaintiff, and, that defendant has now fenced and posted said land only after said suit was filed.

Plaintiff states that no crops have been grown on said property; no timber has been harvested; no livestock has been grazed there, nor has there been any other indication by defendant of any adverse nor exclusive claim by him.

RELIEF PRAYED FOR

The case be remanded to the Circuit Court of Cabell County, Wet Virginia, with Judge Cummings' Order in tact but with instructions for the Court to Order Mr. Hatfield to pay for the survey and roadway construction for an alternate way of necessity for use by Mr. Thompson since Mr. Hatfield built his home so near the old right-of-way as to injure himself and hinder those who would use the said roadway for access to the subject property.

That the Circuit Court meet with the parties; review their earlier settlement plan discussed with the Court as to how to place the respective parcels; order the surveys to be done; and conclude this matter by an exchange of deeds between the parties.

The Circuit Court's Order should also extinguish the Vance one-seventh interest by order since they failed to appear below after service of process had upon them. Mr.

Thompson claims only a two-seventh (2/7) interest, and has no objection to the Circuit Court's Order to allow Mr. Hatfield a five-seventh (5/7) interest.

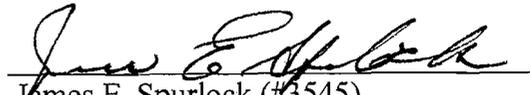
That the Respondent, Vernon Thompson, be awarded his attorney fees and costs in this matter.

VERNON E. THOMPSON
Respondent
By Counsel


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Attorney at Law
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CERTIFICATE OF SERVICE

I, James E. Spurlock, certify that a copy of the foregoing **RESPONDENT'S** **REPLY BRIEF** was served upon Jason A. Poling, Waters Law Group, PLLC, 633 Seventh Street, Huntington, West Virginia 25701, by enclosing the same in an envelope addressed to said counsel at address listed within, being the last address known to me, and by depositing the envelope in the United States mail, postage pre-paid, on the 22 day of October, 2009.



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