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Mary P. Massey v. Lewis H. Prothero and Alene Prothero : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY P. MASSEY, Plaintiff and Respondent, vs LEWIS H. PROTHERO and ALENE PROTHERO, husband and wife, Defendants and Appellants.	Case No. 18213

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BRIEF OF RESPONDENT

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APPEAL FROM THE FIFTH JUDICIAL
DISTRICT COURT OF IRON COUNTY,
STATE OF UTAH

HONORABLE ROBERT F. OWENS
JUDGE PRO TEM

* *

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MARY P. MASSEY, Plaintiff and Respondent, vs LEWIS H. PROTHERO and ALENE PROTHERO, husband and wife, Defendants and Appellants.	BRIEF OF RESPONDENT Case No. 18213

STATEMENT OF THE NATURE OF THE CASE

This is an action in which Plaintiff seeks judicial recognition of her undivided one-fourth (1/4) interest in a family home, farm ground and other real property in Paragonah, Iron County, State of Utah, by way of quiet title to her interest.

DISPOSITION IN LOWER COURT

The case was tried to the court. The trial court entered judgment in favor of Plaintiff/Respondent MARY P. MASSEY and quieted title in her to her undivided one-fourth (1/4) interest in the family home, family farm, and other family property.

RELIEF SOUGHT ON APPEAL

Plaintiff/Respondent seeks affirmance of the judgment entered by the trial court.

STATEMENT OF FACTS

Respondent does not agree with the statement of facts made in Appellants' brief for the reasons that it is incomplete, omits material facts, makes assertions not supported by the record, and generally is a statement of facts as Appellants wish them to be, not as found by the trial court. Further, Appellants failed to view and state the facts in the light most favorable to the findings and rulings of the trial court.

GENEALOGICAL INFORMATION

During their lives, JONATHAN DAVID PROTHERO and AMY ELIZABETH BARTON PROTHERO were man and wife. During their marriage, the following children were born to them in their order of birth:

A. EVELYN PROTHERO SCOTT MASTERIA.

B. DAVID BARTON PROTHERO.

C. REX WILLIAM PROTHERO.

D. LEWIS HENRY PROTHERO.

E. RAYMOND CHARLES PROTHERO.

F. ROE PROTHERO.

G. MARY ELIZABETH PROTHERO MASSEY.

(R40, F of F 1; R53, pages 7:25, 8, 9, 10:1-23).

The following members of the nuclear family consisting of JONATHAN DAVID PROTHERO and AMY ELIZABETH BARTON PROTHERO and their children, died intestate as set forth below:

A. ROE PROTHERO died shortly after his birth, his exact date of death being uncertain, but occurring before

the deaths of the other members of the PROTHERO family, including his parents. ROE PROTHERO never married and left no issue.

B. JONATHAN DAVID PROTHERO died on 21 October 1953.

C. AMY ELIZABETH BARTON PROTHERO passed away on 7 August 1958.

D. RAYMOND CHARLES PROTHERO died on 16 November 1961. He did not marry during life and left no issue.

E. DAVID BARTON PROTHERO died 28 January 1966. He left no surviving spouse or issue.

F. REX WILLIAM PROTHERO expired on 13 November 1978, leaving his surviving wife, RUTH PROTHERO, and two surviving issue, LEVAN PROTHERO and MERTIN PROTHERO. At the time of trial, EVELYN PROTHERO SCOTT MASTERIA, LEWIS HENRY PROTHERO and MARY ELIZABETH PROTHERO MASSEY were the only living children of the JONATHAN DAVID and AMY ELIZABETH BARTON PROTHERO family.

(R40, F of F 2; R53, pages 8, 9, 10, 11, 12).

OWNERSHIP AND USE OF REAL PROPERTY

The real property which was owned by members of the PROTHERO family was in seven (7) parcels in the area of Paragonah, Iron County, Utah, and consisted of the family home and lot, a vacant city lot, and the family farm. (R40, F of F 3).

Insofar as is pertinent to this action, the real property

was owned originally by JONATHAN DAVID PROTHERO and AMY ELIZABETH BARTON PROTHERO. (R40, F of F 4; Exhibit P-4).

Following World War II, a part of the farm property was conveyed by JONATHAN DAVID PROTHERO and AMY ELIZABETH BARTON PROTHERO to their son, RAYMOND CHARLES PROTHERO, who lived in the family home until his death on 16 November 1961. (R40, F of F 5; Exhibit P-4; R53, page 13:17-21).

Prior to the death of JONATHAN DAVID PROTHERO, the home and farm properties were used by him, his wife, and RAYMOND CHARLES PROTHERO for the support of the family members living on and using them. After JONATHAN's death and until AMY's death, the properties were used for the support and benefit of AMY ELIZABETH BARTON PROTHERO and RAYMOND CHARLES PROTHERO, who were the family members actually occupying and using the properties. During this period, taxes were paid by AMY ELIZABETH BARTON PROTHERO, BARTON PROTHERO and RAYMOND PROTHERO. (R40, F of F 6; R53, pages 13:25, 14:1 - 12).

After the death of the mother AMY, RAYMOND CHARLES PROTHERO continued to occupy and use the home and farm properties, although some use and benefit was made of the properties by DAVID BARTON PROTHERO, who moved back into the family home with RAYMOND at an unknown date. Prior to his death, RAYMOND paid property taxes which were levied by Iron County. (R40, F of F 7; R53, page 15:7-18).

Following RAYMOND'S death on 16 November 1961, and

until his own death on 28 January 1966, DAVID BARTON PROTHERO occupied the real properties and took the benefit therefrom. He failed to pay certain property taxes which accrued during his occupancy. (R40, F of F 8; R53, page 18:11-23; Exhibits P-4, D-2, D-3).

During the periods of RAYMOND'S and BARTON'S occupancy following the deaths of the PROTHERO parents, LEWIS HENRY PROTHERO, who resided in his own home in Paragonah with his wife, ALENE PROTHERO, may have assisted RAYMOND and BARTON to some degree with their farming operations, but took no substantial benefits from the properties. (R40, F of F 9).

Following BARTON'S death and until the date of trial, LEWIS HENRY PROTHERO occupied and used the farm properties, benefiting himself thereby. The family home was left unoccupied and unrepaired following BARTON'S death, although it may have been used for storage purposes. The occupancy of Defendant LEWIS H. PROTHERO was not adverse to the interests of the co-owners of the property as set forth below, and was consistent with the co-tenancy interests held by LEWIS' siblings as well as being consistent with the PROTHERO family understandings, customs and agreements. (R40, F of F 10).

FAILURE OF LEWIS PROTHERO TO CONDUCT AGREED PROBATE PROCEEDINGS

Although both PROTHERO parents died intestate, no probate of their real property interests was ever conducted.

(R40, F of F 11).

Following RAYMOND'S death in November of 1961, and on 7 October 1962, LEWIS HENRY PROTHERO met with MARY ELIZABETH PROTHERO MASSEY at her home in California. LEWIS asked for the "deeds" to the property. MARY and LEWIS discussed the need for probate of the estates of their parents and of the estate of RAYMOND. It was agreed that MARY would provide the "deeds" to LEWIS, and that LEWIS would handle and conduct the necessary probates so that those surviving would receive their appropriate inheritances under the Utah laws governing intestacy. (R40, F of F 12; R53, pages 16:4-25, 17:1-7, 74: 17-5, 75:1-4).

On or about 11 December 1962, MARY and her sister, EVELYN PROTHERO SCOTT MASTERIA, mailed the "deeds" to LEWIS, BARTON and AMASA STONES, all of Paragonah, Utah. The evidence was in conflict as to just who actually received the "deeds" from the post office, but it is undisputed that they ended up in the possession of LEWIS HENRY PROTHERO, who, despite his representations to MARY in October 1962, never did conduct probate proceedings. (R40, F of F 13; R-53, pages 17:6-24, 35:2-25, 36:2-25, 36:1-19).

MARY reasonably relied upon the representations of LEWIS that probate proceedings would be conducted so that each heir would receive his or her share. MARY was not familiar with the actions required by probate proceedings

and believed that appropriate proceedings would be or had been conducted until she discovered LEWIS' failure in 1976, as set forth below. (R40, F of F 14; R53, pages 35:11-16, 37:1-3, 57:1-2).

FAMILY RELATIONSHIPS, FAMILY AGREEMENTS, AND USE BY FAMILY MEMBERS OF FAMILY HOME FARM AND PROPERTY

The PROTHERO children, with the exception of RAYMOND, moved away from home upon reaching adulthood. EVELYN, REX, and MARY moved to California. BARTON moved away but eventually returned to Paragonah. LEWIS purchased his own home in Paragonah. (R40, F of F 15).

The members of the PROTHERO family viewed the home and farm properties in Paragonah as their "family" properties, and understood that each family member had an equal interest in the properties, although not physically occupying them at any given time. The family members, including LEWIS HENRY PROTHERO, had an understanding and agreement that those members who were in actual physical occupancy of the home and farm properties could derive the benefits from their occupancy, but that such occupants also had the concomitant duties of "taking care of" the properties, keeping them in good condition and repair, and paying all taxes and assessments which might accrue against the lands for the benefit of all concerned. (R40, F of F 16; R53, pages 14:25, 15:1-4, 19: 6-9, 35: 4-7, 46:6-13, 49:9-13, 64:22-25, 65:1-5, 70:21-25, 71:1-8).

At all times pertinent to this action and until the disputes which are the subject matter of this action arose, all surviving members of the PROTHERO family had complete trust and confidence in each other, and had no idea or reason for believing that one member might attempt to take advantage of any situation to the detriment of any other member or members. The PROTHERO family was very close. The occupancy of Defendants PROTHERO was consistent with the co-tenancy interests of LEWIS' siblings and with PROTHERO family understandings and agreements. (R40, F of F 17; R53, page 71:8-20).

At various times those members of the family, including Plaintiff, who resided outside the State of Utah, returned to Paragonah for purposes of visiting remaining family members and friends, visiting the family home, deer hunting, family reunions, visiting graves of deceased family members, and generally renewing and preserving their ties with their family, friends, home and properties. In so doing, they acted as would any owner would who resides in another state but who retains ties to his birthplace. MARY, herself, was born in the family home, and at all times pertinent to this action, occupied the family home and properties in her own right as a non-resident owner would do. (R40, F of F 18).

When family members returned to Paragonah, they stayed not only in the family home, but with other relatives, friends, and occasionally in commercial accommodations.

Following the death of BARTON in 1966, the family home was not occupied. On many occasions after BARTON died, and after the tax sale in 1967, Plaintiff and her family members were given the hospitality of Defendants' home while in Paragonah, at the express invitation of Defendants. (R40, F of F 19).

PROPERTY TAX SITUATION AND TAX SALE

Some time in May of 1967, after he began use of the family properties following the death of BARTON, Defendant LEWIS HENRY PROTHERO went to the Iron County Courthouse in Parowan, Utah, for the specific purposes of determining whether any property taxes or other assessments on the family properties required payment and if so, to pay them for the benefit of all remaining family members. He understood and felt that it was his duty to pay such taxes and assessments since he was the only remaining family member who was physically using the properties at the time. LEWIS assumed that BARTON had paid the taxes during BARTON's use of the properties. (R40, F of F 20; R53, pages 64: 22-25; 65: 1-5, 14-20; 66:11-17, 94:6-25, 95:1-6).

Upon arriving in Parowan, LEWIS contacted GENE ROBB, then the Iron County Tax Assessor or Treasurer, and determined that BARTON had failed to pay the required property taxes for the year 1962, the year following RAYMOND'S death. LEWIS offered to pay the back taxes but was deterred from so doing by Mr. ROBB, who informed him that the properties would be sold at tax sale in a day or two, and that he, LEWIS, could

purchase the properties for himself if he would bid for them at the tax sale. (R40, F of F 21; R53, pages 65 and 66).

LEWIS then, or shortly thereafter, determined that he would attempt to purchase the properties for himself at the tax sale. Although he had the telephone numbers of his surviving brother, REX WILLIAM PROTHERO and of his sisters EVELYN PROTHERO SCOTT MASTERIA and MARY ELIZABETH PROTHERO MASSEY, LEWIS determined not to call and inform them of the sale, he desiring to be the only family member present to bid for the property. MR. GENE ROBB and MR. CLAIR HULET had informed LEWIS that PROTHERO family members would be given preference in the bidding. MARY was capable of paying all or part of the delinquency, and would have done so had she been advised of the situation. (R40, F of F 22; R53, pages 67-69, 22:10-25, 23:1-2).

On 31 May 1967, LEWIS HENRY PROTHERO appeared at the tax sale in Parowan. Two other individuals were there to bid on the PROTHERO properties, but did not bid when told by LEWIS that he would enter a bid as a family member, with preference due to such a bid. LEWIS HENRY PROTHERO bid the sum of $55.01 for the home and farm properties, which was the total of the 1962 unpaid taxes, plus penalties and interest. On the same day, LEWIS received tax deeds to the properties. At his request, ALENE PROTHERO was listed as a grantee on the tax deeds, although the money used to pay the

amount bid came from LEWIS' earnings as a mine employee. (R40, F of F 23; R53, pages 69-71).

The tax deeds were recorded on 31 May 1967. LEWIS did not inform MARY or his other siblings of his purchase at tax sale or of the recordation of the tax deeds at the time of purchase and recordation. Thereafter, and up to and including the time of trial, LEWIS HENRY PROTHERO paid all property taxes levied upon the family home and farm properties. (R40, F of F 24; Exhibits P-4, D-2, D-3, and D-1). He did so for the benefit of all the heirs. (R40, C of L 7).

RESPONDENT'S DISCOVERY OF APPELLANTS' CLAIMS

In or about the month of May 1974, while on one of her regular Memorial Day visits to the properties, MARY had a conversation with LEWIS in which she requested that they "fix up" the family home together. LEWIS' response was essentially that of "Not right at this time". MARY then dropped the subject. (R40, F of F 25; R53, pages 27:15-25, 28:1-18).

In 1975, MARY and LEWIS did not discuss the situation of the family home and the farm properties. MARY did visit with LEWIS while in Utah both for the Memorial Day Holiday and for the BARTON family reunion. (R40, F of F 26; R53, page 29: 10-14).

Somewhere around the Memorial Day holiday in 1976, while MARY was in Paragonah, LEWIS first told MARY that (a) he had purchased the property at tax sale, (b) that the property was his alone, and (c) that he had conducted no

probate proceedings. This news was such a shock to MARY that she responded with high dudgeon and some profanity. (R40, F of F 27; R53, pages 30, 31:1-16).

Although told of LEWIS' purchase at tax sale while in Paragonah in 1976, MARY could not believe that her trusted brother meant what he had said, and that he truly claimed all interest in the family home and farm, free and clear of what otherwise would be the interests of his siblings. The claim was finally "brought home" to MARY on or about Memorial Day of 1977, when LEWIS saw her visiting the family home and warned her to leave, not to come back, and that he would "have the Sheriff" on her if she set foot on the property again. This action was begun shortly after this incident, on or about 31 August 1977, after MARY had time to consult an attorney. (R40, F of F 28; R53, pages 31:17-25, 32:1-16).

ARGUMENT

INTRODUCTION

In essence, this appeal represents the attempt of Defendants to deprive their surviving relatives of their interests in the family home, farm, and properties, despite the facts that (1) Defendant LEWIS PROTHERO in 1962 promised to probate the family estate, yet never did so; (2) when LEWIS PROTHERO discovered the properties were to be sold at tax sale in 1967, although he originally went to the county seat with the intention of paying the taxes, he then determined that he would purchase the estate properties for himself;

(3) he did so, using his own money, and directed that the name of ALENE PROTHERO be placed on the tax deed; and (4) he then told no one of his acts and waited until such time as he believed that the seven (7) year period related to adverse possession had expired before telling his sister, MARY P. MASSEY, that he claimed the land.

The trial court found all issues in favor of Plaintiff MARY P. MASSEY.

POINT I

AT THE TIMES OF DEATH OF THE VARIOUS PROTHERO DECEDENTS, THE FAMILY PROPERTIES PASSED INTO THE OWNERSHIP OF THE SURVIVING FAMILY MEMBERS AS TENANTS IN COMMON.

UCA 74-4-2 (1953, as amended), states:

> "PROPERTY OF INTESTATE PASSES SUBJECT TO PROBATE PROCEEDINGS. The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purpose of administration."

In Renesland v Ellenberger, 574 P.2d 217 (Kansas 1977), the Kansas Court of Appeals in a case with facts very similar to this one, stated at page 222:

> "When property passes by inheritance to more than one person, the heirs take the property as tenants in common, unless a contrary intent is shown."

In Chamberlain vs Larsen, 29 P.2d 355 (Utah, 1934), which treated the issue of delivery of a conveyance, the Supreme Court held that upon the death of a decedent, title to property of which the decedent died possessed, immediately

vested in her heirs. Also, in the case of In Re: Smithfield City, 262 P. 105 (Utah, 1972), this Court held that the property of one dying intestate passes to his heirs at once, subject to control of the Court for purposes of administration.

UCA 57-1-5 (1953, as amended) requires that a tenancy in common will be presumed where the conveyance is silent. This statute basically expresses the rule that after passage of the statute of 12 Charles II, Chapter 24, Section 1, effective in 1660, which abolished military tenures and converted them into free and common socage, both courts of equity and law, in absence of express words to the contrary, ceased to favor joint tenancies and instead tenancies in common were favored and presumed. See Neill v Royce, 120 P.2d 327, (Utah, 1940).

The cases and statutes cited above leave no other conclusion than that the surviving children and siblings of decedents PROTHERO were immediately vested with title to the property as tenants in common as of the various dates of death. Appellants have not contested this fact.

POINT II

A TENANCY IN COMMON IS NOT TERMINATED BY A SALE TO THE COUNTY FOR TAXES, NOR BY A LATER TAX SALE TO ONE OF THE TENANTS IN COMMON.

Appellants assert that the failure to pay taxes in 1962 resulted in the sale of the property to Iron County on 15

January 1963. They then rely upon 20 AM. JUR. 2d "Cotenancy and Joint Ownership", § 31 for the proposition that the cotenancy relationship was terminated. No case authority to that effect was quoted.

Even if we were to rely upon the wording quoted by Appellants, it is clear that the tenancy in common was not terminated. Any tax certificate prepared in 1963 to Iron County did not change the possessory rights to the PROTHERO family property. Iron County did not go into possession. No one lost possession. Possession remained in the members of the PROTHERO family. The unity of possession was never severed or destroyed.

It is universally held that a tenancy in common requires for its existence but one unity, namely that of possession. Zolezzi v Michelis, 195 P.2d 835, at 837 (Cal. App., 1948).

There is no authority whatever to the effect that the preparation of a tax certificate in 1963 would permit Iron County any possessory right in the PROTHERO family properties.

The cases uniformly hold that even a tax sale, after the usual statutory procedures, will not result in the destruction of a tenancy in common where a co-tenant or someone in league with him purchases at the sale.

In Reed v Nevins, 425 P.2d 813 (New Mexico 1967), the New Mexico Supreme Court held that the conduct of a tax sale, with the resultant issuance of a tax deed, did not

destroy the existing tenancy in common.

The Oklahoma Supreme Court held to the same effect in Boatman v Beard, 426 P.2d 349 (Oklahoma 1967); in Tatum v Jones, 491 P.2d 283 (Oklahoma 1971), and in Bevan v Shelton, 469 P.2d 245 (Oklahoma 1970). In Boatman we find a fact situation similar to the instant case. There, children of an intestate took equal shares as co-tenants. One of the children acquired a tax deed to the land. The tax deed did not destroy the co-tenancy relationship, even though the other heirs did not appear to have considered that they had any interest in the land. In Bevan, the Oklahoma Supreme Court stated:

> "While it is true that the purchaser at the tax sale ordinarily receives a virgin title, yet when the person morally bound to pay the taxes repurchases the land the rule of "public policy" steps in and prohibits him from absorbing and cutting of the right and title of his former co-tenants."

In the Utah case of McCready v Fredericksen, 126 P. 316, at page 318 (Utah 1912), the Utah Supreme Court held that a tax sale will not "operate to dissolve the relationship" between co-tenants.

Clearly, for all purposes involved in this action, the tenancy in common existing between the PROTHERO brothers and sisters was never terminated, either by a sale to Iron County in 1963 or by the tax sale in 1967. Appellants' argument that the tenancy in common was terminated is simply without merit.

POINT III

ONE TENANT IN COMMON MAY NOT SET UP A PURCHASE AT TAX SALE IN DERROGATION OF THE TITLE OF HIS CO-TENANTS. FURTHER, TENANTS IN COMMON STAND IN A FIDUCIARY RELATIONSHIP TO EACH OTHER, AND ARE BARRED AND ESTOPPED FROM ASSERTING ANY CLAIM WHICH HAS ITS SOURCE IN A BREACH OF THAT RELATIONSHIP BY THE ASSERTING PARTY.

Defendants PROTHERO may not set up the purchase at tax sale in derogation of the title of the other family members.

In the case of Heiselt v Heiselt, 349 P.2d 175 (Utah, 1960), at page 177, this Court established the rule that tenants in common stand in a fiduciary relationship to each other and that where one such tenant buys out an outstanding adversary claim to the common title, he cannot assert that claim for his exclusive benefit without the consent of his co-tenants, but holds it in trust for them. This position is in accord with UCA 59-10-57 (1953, as amended), which provides that either of two or more parties interested in a piece of property may redeem property sold at tax sale. In the case of Columbia Trust Company v Neilson, 287 P. 926 (Utah, 1930), this Court specifically stated, at page 928:

> "The law is well settled that one tenant in common of a tract of land cannot set up a tax title acquired by him to defeat the title of his co-tenants."

The Court cited 1 Tiffany, Real Property (2d Edition), Section 201, at page 695, and the cases cited in the footnote.

In the case of McCready v Fredericksen, 126 P. 316,

(Utah, 1912), the Supreme Court entered into a lengthy discussion concerning tenancy in common. The case involved a situation where one of the co-tenants failed to pay taxes, and then purported to purchase the land at tax sale. The Court held that the tenant in common may not acquire title as against his co-tenants by purchasing at a tax sale, and at page 318, stated:

> "Where land is owned by joint tenants, co-parceners, or tenants-in-common, and taxes are assessed upon it as a whole, and it is sold for non-payment of the same, neither of the co-tenants can purchase the title after the sale, which shall be paramount to that of his companions or operate to dissolve the relationship. His payment is regarded as simply discharging the assessment and it will inure to the benefit of all. He acquires no other or greater interest than he held before, except that he has a claim upon the others for reimbursement according to their respective shares. This rule rests upon very obvious principles, and there is no possible question as to its justice and strict legality. For, in the first place, it is plainly a duty which any and each of the co-tenants owes to the state to pay the taxes upon the whole tract when they are so assessed. And, of course, he must not be allowed to reap an advantage from his neglect of this duty. But, in addition to this, there is a strong objection to such a proceeding arising from the mutual relations of the parties. It is well illustrated by the following remarks by the court in Kentucky: "As a general rule, one tenant in common before partition, is not permitted to purchase in a superior outstanding claim for his own exclusive benefit, and much less to use it for the expulsion of his co-tenant. Such a purchase is considered in equity as inuring to the benefit of both, and the purchaser is entitled to a contribution. This principle arises from the privity subsisting between parties having a common possession of the same land and a common interest in the safety of the possession of each, and it only inculcates that good faith which seems appropriate to their relative positions."

The Supreme Court relied upon Black on Tax Titles, sections 282 and 284; Freeman on Co-Tenancy, section 158; and on Cooley in his work on Taxation (3rd Edition), page 963. A redemption from a tax sale by one co-tenant operates as a redemption for all co-tenants. Chavez v Chavez, 244 P.2d 781, (New Mexico, 1952). Because of the legal and moral obligation to pay taxes, a tenant who purchases tax title is trustee for his co-tenants which relationship continues until proper notice repudiating the trust relationship is given and no statute of limitations is applicable until proper repudiation of trust. McGee v Harrison, 277 P.2d 161 (Oklahoma, 1954). One interested in land with others, all deriving their interest from a common source, cannot assert an absolute title to the land through a tax deed to the injury of such others. Stephens v Kesselburg, 143 P.2d 289 (Washington 1943).

Only a few cases have allowed one co-tenant to acquire the title of another co-tenant by tax deed. These few cases are differentiated by the fact that each interest was separately assessed and billed, i.e., there was not an assessment on the undivided whole, as there is in the instant case.

Following the rule set forth above, which is not only the Utah rule, but the rule of every other jurisdiction, known to this author, on the facts of this case it is clear that Defendants PROTHERO may not set up their tax title

contrary to the interests of their co-tenants. When LEWIS PROTHERO bought at the tax sale, he did it for the benefit of his brothers and sisters, as well as for himself, the same as if he had been paying taxes all along. As will be discussed in detail later, "possession of one is possession of all". Further, Defendant LEWIS PROTHERO cannot take advantage of his own delicts in failing to pay taxes to harm the interest of his co-tenants.

Under the circumstances of this case, Appellants are in the position of a fiduciary with respect to their brothers and sisters and are barred and estopped from asserting that they now own the land by adverse possession, by way of tax deed, or by way of statute of limitation.

A fiduciary relationship exists between tenants in common, and one of them may not gain a present advantage by acting adversely to his fellow tenants. Webster v Knopp, 312 P.2d 557 (Utah 1957). A tenant in common who attempts to acquire title adverse to his co-tenants by purchase at tax sale will be regarded as holding such title in trust for his co-tenants. Ruthrauff v Silver King Western Mining and Milling Company, 80 P.2d 338 (Utah 1938). Any act done by a co-tenant for the protection of common property will be presumed to be for the benefit of all tenants. Sperry v Tolley, 199 P.2d 542 (Utah 1948).

An interesting case is that of Lanigir v Arden, 409

P.2d 891, (Nevada, 1966). In Lanigir, one Phillip Arden died intestate, and title to the property vested equally in his eleven surviving children as tenants in common, subject to estate administration. One brother remained in actual possession of the family farm, paid taxes, made improvements, and even sold five small parcels. The wife of the brother who remained in possession was deeded the farm in a divorce settlement. In a subsequent quiet title action, the wife sought to assert the defense of adverse possession. The Nevada Supreme Court reversed the ruling of the trial Court, held that no adverse possession had been established and that each of the heirs of Phillip Arden owned an undivided one-eleventh interest in the farm and stated at page 895:

> "Co-tenants who are brothers and sisters bear a fiduciary relationship to one another. Each is entitled to trust the other and not question the conduct unless its purpose is clearly made known."

Here, of course, MARY P. MASSEY was entitled to trust her brother and her sister-in-law, which she did until May of 1976. In any event, due to their conduct and the fiduciary relationship they bear to the Plaintiff, Defendants' possession was not sufficiently adverse to bring them within the ambit of the adversw possession statutes.

Lanigir goes on to state that:

> "Even as between co-tenants who are not related, the tenant out of possession may assume that the permissive possession of his co-tenant is amicable until notified that it has become

> hostile; and the evidence needed to show the hostility or notice must be stronger than that required in a case between strangers."

Renesland v Ellenberger, above, indicates that the co-tenant against whom adverse possession is claimed must have notice in fact or actual notice of the adverse and hostile intent of his co-tenant where this fiduciary relationship exists. Also see Tatum v Jones, 491 P.2d 283 (Oklahoma 1971) and McCready v Fredericksen, above.

In the case of Giovani v Rescorla, 207 P.2d 1124 (Arizona, 1949), the Arizona Supreme Court held that a person in a fiduciary relationship with another cannot assert adverse possession against that other, and that the statutes of limitations does not begin to run at all. In Giovani, the stepmother of certain minor children was appointed guardian of the children after the death of their father, and was never discharged as their guardian, even though they became of age. She sought to assert adverse possession against property in which the children had an interest, years later. The court held that so long as she was in a fiduciary relationship to the children, and had not been released by order of the Court, she could not initiate an adverse possession against the children, and the statutes of limitations would not begin to run against the children or the estate of a deceased child.

Defendants PROTHERO, as brother, sister-in-law, trustees

and co-tenants in common with the rest of the family owed them a fiduciary duty. They cannot now claim any benefit by reason of having failed to meet that duty.

POINT IV

PLAINTIFF'S CLAIMS ARE NOT BARRED BY THE TAX DEED STATUTES OF LIMITATIONS, UCA 78-12-5.1 AND 5.2 (1953, AS AMENDED).

It is a well- settled rule in most jurisdictions that a statute of limitations does not begin to run until the person against whom it is asserted has notice of the facts involved and particularly, where a claim of adverse possession is involved, until the owner of the property has notice of the alleged open, notorious, hostile, and adverse possession and intent of the person asserting the claim. See Memmott v Bosh, 520 P.2d 1342 (Utah 1974), and McKnight v Basilides, 143 P.2d 307 (Washington 1943). The same reasoning holds for the four year statutes of limitations with respect to tax deeds. In the instant case, of course, Plaintiff had no notice of the claims of Defendants until approximately May of 1976. She did not believe that the claims were serious until 1977. The claims of Defendants were finally "brought home" to Plaintiff at or about Memorial Day of 1977, when LEWIS saw MARY visiting the family home and warned her to leave, not to come back, and that he would "have the Sheriff" on her if she set foot on the property again. (R40, F of F 28).

Further, the statutes relied upon by Appellants do not apply to disputes between those entitled to the benefit of a tax deed title. The lower court specifically found that the legislature's purpose in passing UCA 78-12-5.1 and 5.2 (1953, as amended), manifestly was to enhance the marketability of tax titles by cutting off rights of previous owners. However, by reason of the trusts imposed on Defendants PROTHERO and because of the co-ownership of the PROTHERO family properties, the court specifically held that a dispute between tax title grantees does not infringe upon the purpose of the statute. Basically, the reason is that, as found by the trial court, the tax purchase was made for the benefit of all concerned, including Plaintiff. In other words, Plaintiff and all her brothers and sisters can claim the benefit of the tax purchase. It was made for them as well as for LEWIS.

The statutes relied upon by Appellants are not applicable in cases in which the party bringing the action was "seized or possessed of such property within seven years from the commencement of the action", or where the person commencing the action or interposing the defense or his predecessor "had actually occupied or been in possession of such property within four years prior to the commencement or inposition of such action or defense . . . ".

The statutes in this case could not and did not run

against Plaintiff for the reason that she was always in actual possession of the premises as well as in legal possession through her co-tenants, LEWIS PROTHERO.

The authorities are uniform in holding that one co-tenant in possession holds possession for all. In the case of Kinny v Ewing, 49 P.2d 636 (California 1972), at page 639, we read:

> "....the possession of one co-tenant is in contemplation of the possession of the other."

Also, see Schmitt v Felix, 321 P.2d 473 (California 1958), Fallon v Davidson, 320 P.2d 976 (Colorado 1958), and Barkus v Galdreadth, 207 P.2d 559 (Montana 1949). There is a plethora of additional cases standing for this proposition and space will not permit listing all such citations.

Although counsel has been unable to discover a Utah case stating the proposition as clearly as Kinny, it is apparent in the fiduciary cases and in McCready, above, and others, that the proposition is accepted by this court, although not expressly stated. It necessarily follows that if a tenant who is out of possession and doesn't ever visit the property as in McCready is deemed to be in possession for the purposes of contesting a tax deed, the fact that MARY P. MASSEY and her surviving siblings visited the family premises at least once a year and often more, is a fortiori, actual possession by said individuals in their own rights, as well as possession in law through LEWIS PROTHERO, their

co-tenant.

The defense asserted by PROTHEROS must fail. MARY P. MASSEY and her surviving siblings actually occupied the land in their own right each year, as non-resident land holders would normally do. Further, MARY P. MASSEY and her surviving siblings, as co-tenants with LEWIS PROTHERO were in possession through Defendant LEWIS PROTHERO.

UCA 78-12-7 (1953, as amended), states in effect that the title owner is presumed to be in possession unless the person claiming otherwise can clearly show that the owner was not in possession. Since the PROTHEROS cannot set up tax title to defeat title of their relatives, the presumption obtains and is not rebutable.

Although a purchaser at tax sale ordinarily receives a virgin title, when persons morally bound to pay taxes repurchase land from a purchaser at a tax sale, public policy prohibits them from absorbing and cutting off the rights and title of their former co-tenants. The tax deed statute of limitations does not apply where one co-tenant is in possession of land by right of inheritance or family agreement, and such possession will not be deemed to be adverse to co-tenants out of possession without a clear showing of the adverse claim being "brought home" to them. Bevan v Shelton, 469 P.2d 245 (Oklahoma 1970).

In the case of Boatman v Beard, 426 P.2d 349 (Oklahoma

1967), one co-tenant purchased a tax deed in 1932. No notice of ouster was given to any other co-tenant until 1950 or 1951, 18 or 19 years later. Oklahoma had a five year statute of limitations applicable to tax deeds. The Oklahoma Supreme Court held that the tenant claiming the benefit of the statute of limitations was not entitled to such benefit for the reason that the statute of limitations did not begin to run in favor of one co-tenant in favor of others until actual ouster by the claiming co-tenant or other acts on his part amounting to total denial of the acts of others, and until actual notice or knowledge of such acts relied upon were "brought home" to them to show denial or repudiation of their rights. The Oklahoma Supreme Court so held despite the recordation of a tax deed.

The matter was even more clearly stated by the Oklahoma Supreme Court in McGee v Harrison, 277 P.2d 161 (Oklahoma 1954). In McGee, the Oklahoma Supreme Court stated at page 162:

> "Defendant had both a moral and legal obligation to pay the taxes on the land and his purchase of the tax title was a mode of paying taxes. (citing cases). By his purchase at tax sale, he became trustee for his co-tenants which relationship continued until Defendant gave proper notice to his co-tenants that he was repudiating the trust and holding title adversely. The only notice given by Defendant before this suit was filed was that adverted to above, which was not sufficient notice to repudiate the trust. No statue of limitation would start to run until repudiation of the trust relationship."

This court has held substantially the same as the Oklahoma Supreme Court in the case of Walker v Walker, 404 P.2d 253 (Utah 1965). In Walker, the oldest son took title to the family property in order to provide a home for his mother. Although he took title in his own name, it was understood between the family members that he was holding the property for the benefit of the entire family. Suit was not brought until after the death of the mother and forty-two (42) years after the oldest son took title to the property. This court held that the defense of the statute of limitations is not available to a trustee as against his beneficiaries until something has occurred to give clear indication to them that he has repudiated his trust.

In this action, Defendants did not repudiate the trust and, in fact, let "sleeping dogs lie" until 1976, when LEWIS first told Plaintiff that he had purchased the deed at tax sale.

The Arizona Supreme Court held, in Giovani v Rescorla, 207 P.2d 1124 (Arizona 1949), that a trustee cannot take advantage of the statute of limitations as against his beneficiaries.

In any event, as discussed in previous points, Appellants are not in any situation where they would be entitled to assert the statute of limitations against their co-tenants, particularly where LEWIS PROTHERO falsely represented that

he would probate the properties and then failed to do so.

In addition to the statutes cited, Defendants rely on the cases of Dye v Miller and Viele, 587 P.2d 139 (Utah 1978), Peterson v Callister, 313 P.2d 814 (Utah 1957), and on Frederiksen v LaFleur, 632 P.2d 827 (Utah 1981). Appellants' reliance upon these cases is not well founded. None of these cases involves tenancy-in-common, actual possession, the existence of any fiduciary relationship, the creation and imposition of any trust, or any dispute between persons entitled to the benefit of tax title. Appellants have not cited any authority involving situations similar to those in this case, for the reason that there is no such authority favorable to them.

POINT V

APPELLANT ALENE PROTHERO OBTAINED NO INTEREST BY REASON OF THE TAX SALE GREATER THAN THE UNDIVIDED INTEREST HER HUSBAND OTHERWISE ENJOYED, AND IN ANY EVENT, COULD NOT AND DID NOT OBTAIN ANY INTEREST FREE OF THE CLAIM OF HER HUSBAND'S CO-TENANTS IN COMMON.

Appellants argue that the trial court erred in finding a fiduciary duty on the part of ALENE PROTHERO, and in imposing the same upon her. Again, Appellants cite no authority to support their contention.

Actually, ALENE PROTHERO appeared to be a stranger to the tax sale. She did not appear at the tax sale. No money earned by her was used to pay any part of the taxes, penalties

and interest relating to the unpaid 1962 taxes. The only money used was money earned by LEWIS PROTHERO at his employment at a mine. Although ALENE PROTHERO was not at the tax sale, her name appears on the tax deed for one reason only: her husband asked the auditor to put his wife's name on the deeds. Appellant ALENE PROTHERO did not pay any consideration whatever for the placing of her name on the deeds.

Appellant ALENE PROTHERO cannot claim to be a bona fide purchaser for value, since she gave no value. Further, she knew that the properties were acquired through the deaths of other family members and that some of the family members were still alive. If she were deemed to take any interest, she must be deemed to have taken it with knowledge of the claims of her surviving brothers and sisters-in-law. By reason of that fact, any interest which she may have is subject to the prior interests of such brothers and sisters-in-law. The trial court properly imposed a trust upon ALENE PROTHERO based upon the express understandings and agreements in the PROTHERO family as well as by reason of operation of law.

In the case of Webster v Knop, 312 P.2d 557 (Utah 1957), a mining location was made by one of the partners to a grubstake agreement in an area which was not open to location. The location was void because of the existence of a valid oil and gas lease on the property. Later, after Congress passed legislation allowing mineral claims to be

filed over existing oil and gas leases on public domain, another of the partners to the grubstake agreement filed a new location, using the same discovery markers and monuments but filing the notice of location in his own name. The Utah Supreme Court held that technically there was no "relocation", but that the newly-locating partner held the location in trust for all of the partners to the prior grubstake agreements. This court also went further and held that subsequent transferees, who had notice of the grubstake agreements and of the original location in the names of the parties to that agreement were not bona fide purchasers of the claim which was relocated by one of the original co-locaters after the termination of the agreement, and held that the subsequent transferees did not take free of the equitable constructive trust interests of the other original locators.

ALENE PROTHERO, of course, knew of the family situation and the situation with respect to the properties. Any interests which she might have obtained by reason of the tax deeds could not have been any greater than the interests held by her husband, LEWIS PROTHERO, who caused her name to be placed on the tax deeds, and in any event, is subject to the interests of her surviving brothers and sisters-in-law.

In addition, the Courts have held that one co-tenant may not interpose his spouse or even a third party at tax

sale or thereafter in order to defeat the claims of his co-tenants. In Bevan v Shelton, 469 P.2d 245, (Oklahoma 1970), the Oklahoma Supreme Court held that where a person morally bound to pay taxes repurchases land from the purchaser at tax sale, public policy prohibits him from asserting and cutting off the rights and titles of his former co-tenants. In other words, even if LEWIS PROTHERO had not bid in at the tax sale, but had permitted the land to be sold to a third party, and had then purchased the land from the third party, that action would not have cut off the rights of the other PROTHERO brothers and sisters. How, then, can appellants assert that the mere placing of the name of ALENE PROTHERO on the tax deeds by her husband can terminate such rights?

In Myers v Parkins, 412 P.2d 136 (Oklahoma 1965), the Oklahoma Supreme Court held that the purchase of land by one who, despite his moral or legal obligation to pay taxes on land, permitted the land to be sold for taxes and then bought it, either in person or indirectly through the agency of another, is deemed only a mode of paying taxes, and the purchaser does not thereby acquire any title in the land antagonistic to that of his co-tenants. Appellants PROTHERO cannot therefore use the name of the wife as a means of defeating the claims of brothers and sisters who are co-tenants.

In Apodaca v Hernandez, 302 P.2d 177 (New Mexico 1956), the New Mexico Supreme Court held that where a mother and father who owned realty died intestate, and there was no

administration of their estates, and where one of the sons who lived on the realty permitted it to be sold for delinquent taxes and such son and his wife, knowing that they could not purchase the tax title in their own names free and clear of the names of their co-tenants, advanced money to a third person who purchased the tax title, received a tax deed, and then conveyed the realty by quit claim deed to the son, the method employed by the son and his wife in acquiring title did not constitute such a claim under color of title made in good faith as to lay the foundation for the application of the statute of limitations relating to adverse possession.

Clearly, any interest of Appellant ALENE PROTHERO in the realty is (1) no greater than the undivided interest originally held by her husband LEWIS PROTHERO, (2) is subject to the claims of her brothers and sisters-in-law and (3) is properly subject to the trust imposed by the trial court as a result of express family agreements, understandings and by reason of operation of law.

POINT VI

APPELLANTS ARE NOT ENTITLED TO THE BENEFITS OF THE LAW RELATING TO ADVERSE POSSESSION, NOT HAVING MET THE APPROPRIATE REQUIREMENTS.

Appellants claim the benefit of the laws relating to adverse possession, despite the holding of the lower court that they failed to prove their entitlement to the properties under the doctrine of adverse possession. The trial court found that all taxes paid by Defendants following 31 May

1967 through May 1976 were paid for the benefit of all the heirs to the property. The trial court further found that the defendants' occupancy of the property was not of the nature or period required by the law of adverse possession, and that specifically, Defendants had a fiduciary duty to Plaintiff to preserve and protect the respective family interests in the property, not only because of the relationship of co-tenancy, but also from the express and implied promises arising in the PROTHERO family, including that agreement that the person using the properties be required to pay property taxes and assessments.

Further, the tax deeds acquired by Appellants do not constitute claim or color of title in good faith which will form a foundation for adverse possession. Where a co-tenant delays performance of his duty to pay taxes and redeem the property on behalf of all the tenants in common, such failure establishes that the "color of title" which would otherwise be provided by the tax deed is not a good faith claim adverse to the interests of the other co-tenants to establish title by adverse possession. Reed v Nevins, 425 P.2d 813 (New Mexico 1967).

Although a given paper may constitute "color or claim of title", no prescription can be based thereon unless the claimant entered thereon honestly and in good faith. Adverse possession must be openly hostile in order to result in

title by adverse possession. In a situation where a mother and father who owned realty died intestate, and there was no administration of their estates, and one of the sons who lived on the realty permitted it to be sold for delinquent taxes, and the son and his wife, knowing that they could not purchase the tax title in their own names free of the claims of their co-tenants advanced money to a third person who did purchase the tax title and received a tax deed, and then conveyed the realty by quit claim deed to the son, the method employed by the son and his wife in acquiring title through the tax deed was not such a claim under color of title made in good faith as would lay the foundation for the application of the statute of limitations relating to adverse possession. Apodaca v Hernandez, 302 P.2d 177 (New Mexico 1956).

Further, the taxes were not paid in such a manner that appellants could take advantage of such payments in relation to their claim of adverse possession. The lower court specifically found that the taxes were paid for the benefit of all the heirs, up to and including May of 1976. This action was filed in August of 1977. Obviously, the taxes were not paid by Defendants for the period of time required by the statutes relating to adverse possession in such a manner that appellants could claim the benefit of the payment, since the payments were made for the benefit of all prior to May of 1976. Further, the payment of taxes is not notice of

any claim relating to adverse possession. Heiselt v Heiselt, 349 P.2d 175 (Utah 1960). The testimony before the trial court did not support any contention that Appellants made any substantial improvements. Some improvements were made, of course, but they were minimal in nature. In any event, none of the improvements were attributable in any manner to the claim of adverse possession. The fact that a co-tenant in possession of land makes even extensive improvements thereon while living there is not inconsistent with the existence of a co-tenancy. Heiselt, above.

In any event, there was no adverse use prior to 1976. As a matter of fact, the reality of the claim of adverse possession was not "brought home" to Plaintiff until 1977. All prior use of the family properties was totally consistent with the existence of the tenancy in common.

One co-tenant can adversly possess against another, but because possession of one co-tenant is considered possession of all, the act of the co-tenant in possession cannot be assumed to be sufficiently hostile from the fact of possession alone; generally, some notice of the intent of the co-tenant in possession to adversly possess against his other co-tenants is required, and without such notice, co-tenants out of possession are rightfully entitled to assume that their co-tenant is holding the property for all. Kennedy v Rhinehart, 574 P.2d 1119 (Oregon 1978).

Even the exclusive occupancy by a tenant in common is deemed permissive and cannot become adverse until the tenant out of possession has had notice that the possession of his co-tenant is hostile against him. Zolezzi v Michelis, 195 P.2d 835 (Cal. App., 1948).

Before a tenant in common can acquire the interest of his co-tenants by adverse possession, there must be an actual ouster by the co-tenant or some act or acts sufficient to establish repudiation of rights of the co-tenants, and absent some conduct which discloses a complete denial of interest of a co-tenant, even exclusive possession by his co-tenant is considered to be in subordination to his rights and does not amount to adverse possession. Even the use of property for grazing, fencing of it, paying property taxes, collecting rents, mortgaging part of the property and executing oil and gas leases and retaining the money from them are insufficient to notify co-tenants that their rights and properties have been repudiated and do not constitute an ouster. Tatum v Jones, 491 P.2d 283 (Oklahoma 1971).

Possession originating in co-tenancy is permissive, not hostile, and is not adverse possession. Occupation of the family estate by one of the family is so usual that acts of occupation thereof which would be sufficient to show hostile possession as to strangers, are not sufficient as between

the family members. Apodaca, above.

Any act done by a co-tenant for the protection of the common property will be presumed to be for the benefit of all the tenants. The fact that a tenant in common makes repairs and improvements, dwellings, buildings, and fences on the common property does not indicate an intent to hold adversly to the other tenants in common, since such acts are consistent with the tenancy and not adverse to it. Further, the fact that tenants in common might be in exclusive possession of the property for more than seven years does not show that their possession is adverse to the other tenants, since each co-tenant is entitled to possession of the entire property. Sperry v Tolley, 199 P.2d 542 (Utah, 1948).

Before a co-tenant may make any claim adverse to the interests of his co-tenants, and before the statute of limitations relating to adverse possession begins to run, he must "bring home" his adverse claim to his co-tenants. See Memmott v Bosch, supra; Boatman v Beard, supra; McReady v Fredericksen, supra; Apodaca v Hernandez, supra; Sperry v Tolley, supra; Tatum v Jones, supra; and Laniger v Arden, supra.

The obtaining and recording of a tax deed does not constitute notice of an adverse claim. See Sperry v Tolley,

above, where this Court held that the fact that a co-tenant purchased a tax title to the common property in his own name, is insufficient to put his co-tenants on notice that he is claiming the property adversely to them. Also see Boatman, above, holding that the acquisition of a tax deed did not destroy the co-tenancy relationship.

POINT VII

THE TRIAL COURT PROPERLY HELD THAT THE LAW IMPOSED A TRUST UPON APPELLANTS.

In their brief, Appellants do not dispute the holding of the trial court that appellants were the subjects of a trust imposed by law and by reason of the express family agreements and understandings relating to the property.

The law provides for the imposition of "resulting" and "constructive" trusts in the appropriate circumstances. See 76 AM. JUR. 2d, Trusts, § 189 - 250 (1975 as amended).

The clear inference arising from the holdings of all the cases relating to the purchase of tax deeds where co-tenants are involved is that the one who purchases the tax title does so in trust for the benefit of his co-tenants as well as for his own benefit, he being under a moral and legal obligation to pay the taxes. The purchase is viewed as nothing more than a manner of paying the taxes. He will not be allowed to assert that tax purchase in derogation of the rights and titles of his co-tenants. The fact that a

spouse or third party may be named on the tax deed is irrelevant, and such spouse or third party takes subject to the interests of the other co-tenants.

At times, the courts have imposed trusts on co-tenants, and even on those not co-tenants, to correct situations similar to the case at bar. In the case of Hendrickson v California Talc, 130 P.2d 806 (Cal. App. 1943), the appellate court held that where locators of a mining claim associated themselves together for the purpose of obtaining title to a claim and complying with all legal requirements, but where their efforts were ineffective for the time being because the land was temporarily withdrawn from entry, and one of them, after discovering the invalidity of the entry, and without informing the others of such fact, relocated the land for himself alone when the right of entry was restored, the person doing the relocating was held to be a trustee for the other locators, even if the other locators were not, strictly speaking, co-tenants with him, for the reason that the trust resulted from the parties' fiduciary relationship. The appellte court also held that a fiduciary relationship exists between tenants in common, and that one of them may not gain a present advantage by acting adversly to his fellow tenants.

In Webster v Knop, 312 P.2d 557 (Utah 1957), this

court upheld the trial court's action in imposing a trust upon a mining property. The facts were essentially that mining claims were located under a grubstake agreement in which those making the agreements were to take a one-third interest. The location was void because of the existence of an oil and gas lease. Subsequently, congress changed the law so that it was possible to locate a mineral claim on land which had an oil and gas lease in existence. One of the parties to the original grubstake agreement then "relocated" the claims, and sold them. The other parties to the grubstake agreement brought suit for their share in the mining properties against the transferees. The lower court held that the property was subject to a constructive trust. This Court found Hendrickson v California Talc to be dispositive. It agreed with the reasoning of the California court when it stated that the "trust results from the fiduciary relation of the parties and not from whether or not they may technically be said to be co-tenants". This court then went on to hold that a constructive trust arose to protect the interest of the original co-locators under the grubstake agreement, and went on to analyze whether the constructive trust could be imposed not only on the original locator but upon the transferees. At page 560, this court stated:

"The equitable interest of a trust in the beneficiaries may be cut off as against a bona fide purchaser for value from the trustee or constructive trustee. He must have had no notice, actual or constructive, and he must pay value. Peterson v Peterson, 112 Utah 554, 190 P.2d 135. As stated in the Restatement Restitution, § 12(a), adopted in the Peterson case:

> "A person has notice of facts giving rise to a constructive trust not only when he knows them, but also when he should know them; that is, when he knows facts which would lead a reasonably intelligent and diligent person to inquire whether there are circumstances which would give rise to a constructive trust, and if such inquiry when pursued with reasonable intelligence and diligence would give him knowledge or reason to know of such circumstances."

In this situation, both Appellants were fully aware of the facts relating to the demise of the various members of the PROTHERO families. They were also aware of the understandings and express agreements between the PROTHERO family members that those persons using the family properties would be required to maintain them, protect them, and pay the taxes on them in return for the benefit derived from the use of the properties. Appellant LEWIS H. PROTHERO alone paid even minimal consideration, consisting only of the taxes, penalties and interest, which had accrued with respect to the year 1962. ALENE PROTHERO paid nothing. Both were fully aware

of the situation.

In equity, the trial court imposed a trust upon Appellants in order to prevent the perpetration of severe injustice and fraud.

POINT VIII

APPELLANTS ARE BARRED AND ESTOPPED FROM MAINTAINING ANY INTEREST ADVERSE TO THE INTERESTS OF PLAINTIFFS BY REASON OF THE DOCTRINE OF EQUITABLE ESTOPPEL.

Appellants at all times in this action have been and are now estopped from claiming any interest in the property of the PROTHERO family, adverse to Plaintiff's interest by reason of the doctrine of equitable estoppel. If permitted to assert claims in derogation of Plaintiff's interest, a fraud will result.

The silence of Defendant LEWIS PROTHERO at the time he determined he would purchase the property for his own benefit is a fraud. Had Plaintiff known of the tax delinquency, she would have been able to protect her interest. Relying, however, on the trust existing between the PROTHERO family members and based upon their express agreements and understandings with respect to the property, and more particularly, to the effect that the person using the properties would pay the taxes, she did nothing. Such reliance, at least as asserted by Appellants, resulted in the loss of her property.

Under these circumstances, the law bars and estopps Appellants from asserting claims which would result in stripping Plaintiff of her interest in the family properties.

See 28 AM. JUR. 2d, Estoppel and Waiver, § 26 - 117.

CONCLUSION

The surviving members of the PROTHERO family were tenants in common as to the family properties. The tenancy in common was not terminated by the sale of the properties to Iron County in January 1963 because of the failure to pay 1962 taxes. In fact, part of the tenancy in common arose by the death intestate of BARTON PROTHERO in or about 1966. The tax sale in 1967 did not terminate the tenancy in common. The name of ALENE PROTHERO was placed on the tax deeds at the instruction of LEWIS PROTHERO. The money for the tax sale came from money earned only by LEWIS PROTHERO. ALENE PROTHERO did not contribute in any way. At the time of the sale, Appellants knew of the circumstances surrounding the parties. The family was a trusting family and Respondent stayed with Appellants for several years following the tax sale, when she visited the property in Iron County. Under the law, one tenant in common may not set up a purchase at tax sale in derogation of the title of his co-tenants. Further, tenants in common stand in a fiduciary relationship with each other, especially where they are family members and are barred and estopped from asserting a claim which has its source in a breach of that relationship by the asserting party. The statutes of limitations relied upon by Appellants do not apply to this situation. First, the tax deeds statute of limitations does not apply to disputes between those

entitled to the benefit of tax deed title. All the surviving PROTHERO heirs are entitled to the benefits of the tax deed, since it was purchased in trust by Appellants. Further, even if the statutes of limitations relied upon by Appellants were to apply, they did not run and expire prior to the filing of this action in August of 1977. Appellants' claims related to the tax deeds and adverse possession were not "brought home" to Plaintiff or anyone else until 1977. Defendants argue facts which are not supported by the record in an effort to take notice of Appellants' claims back beyond a time sufficient to apply the statutes of limitation. The trial court expressly found that even if the statutes of limitation were applicable, they did not run. In any event, the statutes did not run because Plaintiff was always in actual possession of the property in the normal use of it which would have been made by any non-resident owner. Further, Plaintiff was in legal possession as a tenant in common through the possession of LEWIS H. PROTHERO.

Appellant ALENE PROTHERO obtained no interest by reason of the tax sale, greater than the undivided interest her husband otherwise enjoyed. In any event, she could not and did not obtain any interest at all, free of the claims of her husband's co-tenancy in common, being her brothers and sisters-in-law, since she full well knew of the circumstances.

She did not pay any consideration for whatever interest she did obtain, and was not a bona fide purchaser. To permit the stripping of title from family members by other family members, under circumstances such as those in this case, is against public policy.

Appellants are not entitled to the benefits of the laws relating to adverse possession. First, they have no valid color of title obtained in good faith. Second, they have not paid taxes for the required period of time. Prior to May of 1976, taxes were paid for the benefit of all the heirs. None of the improvements attributable to LEWIS H. PROTHERO were made pursuant to any claim of adverse possession. The improvements were not of major importance and did not cost much money. Further, they were totally consistent with the existence of a tenancy in common. The use made of the of a tenancy in common. The use made of the properties by LEWIS H. PROTHERO was consistent with the existence of a tenancy in common. Appellant ALENE PROTHERO made no use of the properties.

The trial court very properly imposed a trust upon appellants. This was and is necessary in order to prevent manifest injustice and the perpetration of a fraud by Appellants.

Appellants are equitably barred and estopped from asserting any claims in derogation of Plaintiff's interest

in the PROTHERO family properties, since to bar them would be to permit Appellants to perpetrate a fraud, contrary to the manifest interest of justice in this action.

The Decree of the trial court should be affirmed.

DATED: 3 June 1982.

WILLARD R. BISHOP, P.C.,
A Utah Professional Corporation

BY: _____
WILLARD R. BISHOP
Attorney for Plaintiff/
Appellant

CERTIFICATE OF MAILING

SERVED the within and foregoing document upon the Defendants/Appellants above-named, by mailing two full, true and correct copies to Mr. Hans Q. Chamberlain and Mr. Thomas M. Higbee, Attorneys at Law, at 110 N. Main Street, Cedar City, Utah 84720, first class postage fully prepaid this 3rd day of June 1982.

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