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Ejectment—"Common Grantor" and "Common Source" Distinguished

C. M. C.

West Virginia University College of Law

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We are pleased to report that on certiorari the United States Supreme Court, reversing the court of appeals, *held*, an attorney is not an "officer" of the court within the meaning of § 401 (2). The court found it unnecessary to decide whether petitioner was engaged in an "official transaction," thereby going even further than was suggested at 58 W. VA. L. REV. 88. Mr. Justice Black, writing for the majority explained that the statute applies only to conventional court officers such as marshalls, bailiffs, court clerks or judges. The congressional intent in framing this statute was to curtail the power of the court to punish for contempt, so that it should be strictly construed. *Cammer v. United States*, 76 Sup. Ct. 456 (1956).

M. J. P.

EJECTMENT—"COMMON GRANTOR" AND "COMMON SOURCE" DISTINGUISHED.—In 1900, A conveyed Whiteacre to O, and in 1909 B conveyed Blackacre, an adjoining tract, to O. O deeded Blackacre to P in 1924, without setting forth the courses and distances of the boundary between Blackacre and Whiteacre. Whiteacre was devised by O in 1935, and the devisees conveyed to D in 1949, describing the boundary by courses and distances. A discrepancy existed as to the boundary, based on the description in D's deed and the field notes of A, said notes being on record. Apparently O transferred both tracts by the same descriptions as she had received them. D entered the tract as described by the notes of A, and P brought ejectment, proving his title back to O. Verdict for P reversed, case remanded and new trial awarded. *Held*, that while a plaintiff in an ejectment action need only prove his title back to a common source, the terms "common source" and "common grantor" are not synonymous and interchangeable, and the rule does not apply when it affirmatively appears that the real dispute between the parties involves the location of a boundary between two distinct tracts of land, one of which the common grantor derived from one source and conveyed to P or his predecessor in title and the other of which the common grantor derived from another source and conveyed to D or his predecessor in title. *Toppins v. Oshel*, 89 S.E.2d 359 (W. Va. 1955).

As a general rule, plaintiff in an ejectment action must trace an unbroken chain of title to the state, or establish title by adverse possession. *Furbee v. Underwood*, 107 W. Va. 85, 147 S.E. 472

CASE COMMENTS

301

(1929); *Low v. Settle*, 32 W. Va. 600, 9 S.E. 922 (1889). An important exception to the rule is that when both parties claim title from a common source, each is estopped to deny the validity of the title so derived. *Winding Gulf Colliery Co. v. Campbell*, 72 W. Va. 449, 78 S.E. 384 (1913); *McClung v. Echols*, 5 W. Va. 204 (1872). The reason for this estoppel is that neither party should be allowed to assume the inconsistent position of claiming both under and against the same title. *Summerfield v. White*, 54 W. Va. 311, 46 S.E. 154 (1903); *McClung v. Echols*, *supra*. The court distinguished the factual situation in the principal case and held that this exception to the general rule had no application, as there is no inconsistency in allowing the defendant to attack the title of the common grantor, as defendant is not claiming under the same title as the plaintiff. The court relied on *Jennings v. Marston*, 121 Va. 79, 92 S.E. 821 (1917) as authority for the point here discussed. There, plaintiff proved title back to O, who had also owned the tract defendant claimed. This was held insufficient proof of title to support an action of ejectment, as the common grantor had acquired title from different sources and had conveyed them by separate deeds. The opinion in the instant case used almost identical language with that of the Virginia court in assigning reasons for the distinction; *i.e.*, that the mere fact that a predecessor in title held two deeds to two separate but adjoining tracts, is not alone sufficient to make him a common source of title.

Few cases have made the distinction in question. In *Butt v. Mastin*, 143 Ala. 321, 39 So. 217 (1905), the common grantor had acquired title to an entire subdivision by a single conveyance, but the conveyance was of numbered lots. It was said that this was not sufficient to establish a common source so as to estop the defendant from attacking plaintiff's title. The court reasoned that an admission of the common grantor's title as to part was not an admission of his title to the whole, and that it might be said that defendant purchased the part to which he considered the grantor had good title, and did not buy the balance because he considered the title bad. This is somewhat analogous to the situation where A conveys the timber on certain land to B, and then conveys the land excepting the timber to C. B is not estopped to deny A's title to the land, nor is C estopped to deny A's title to the timber. *Gaskins v. Gray Lumber Co.*, 6 Ga. App. 167, 64 S.E. 714 (1909). There is a stronger reason for this holding than that of the principal case, because the estoppel based on a common source of title applies only

when both parties claim title to the same property. *Sinclair v. Friedlander*, 197 Ga. 797, 30 S.E.2d 398 (1944).

In *Summerfield v. White*, *supra*, there is a dictum that seems to support the position of the court in the *Toppins* case. Plaintiff claimed under *O*, who had owned that tract in fee, while *O* had owned defendant's tract as a tenant in common. The court said that since the cotenant of *O* would not be estopped to claim to the full extent of his deed, even though hostile to an adjoining tract owned by *O*, ". . . it is apparent that the two titles in question do not come from the same source. . . ." *Id.* at 321. Again, there would be a stronger reason for this holding than that of the instant case, because defendant claimed under the cotenant as well as under *O*.

However, it is submitted that the distinction between "common grantor" and "common source" as made in the *Toppins* case is the correct and logical rule. When there is a common source of title, such as an undivided tract subsequently divided, an attack on part of the title is an attack on the whole, and an estoppel is proper. But when the common grantor has acquired title to the adverse tract from a stranger to the title of the other tract, and has conveyed them as separate tracts, doing nothing to merge the parcels, the validity of the title to one tract will have no effect on the validity of the title to the other tract, and neither party should be estopped to attack the title of the adverse claimant.

C. M. C.

INTERFERENCE WITH CONTRACT—LIABILITY WHERE NO ENFORCEABLE CONTRACT.—*P* owned a tract of land on an island. *A* contracted with *B* construction company to dredge a channel in waters adjoining *P*'s land. *P* gave *A* and *B* permission to use a strip of his land for the purpose of depositing the dredged material in a bay adjoining this land. This would have increased the value of *P*'s land. *P* alleged that *D*, having no right to do so, advised *B* that if it proceeded to build up *P*'s land with dredged materials, then he, *D*, would sue to restrain the operation. In consequence of *D*'s action, *B* deposited the materials elsewhere. *D* filed a demurrer on the ground that the complaint failed to state a cause of action for it appeared from the complaint that *P* had no enforceable contract. Demurrer sustained. *Held*, that *P*'s complaint failed to state