IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00136 COA

WILLIAM H. MCINTOSH, JR. AND ALICE MCINTOSH TURNER — **APPELLANTS**

v.

ROGER G. BEECH, PEACOS J. BEECH, BRETT GILLAN HILLMAN, CHARLES HORTON HILLMAN, PHYLLIS TURNER ISHEE, RUTH MARIE HILLMAN AND M. R. HILLMAN — **APPELLEES**

AND

ROGER G. BEECH, PEACOS J. BEECH, BRETT GILLAN HILLMAN, CHARLES HORTON HILLMAN, AND PHYLLIS TURNER ISHEE — **CROSS-APPELLANTS**

v.

JOHN NEAL KITTRELL, ROSA LEE EVERETT KITTRELL, AND WILLIAM H. MCINTOSH — **CROSS-APPELLEES**

DATE OF JUDGMENT:	12/30/94
TRIAL JUDGE:	HON. KENNETH ROBERTSON
COURT FROM WHICH APPEALED:	GREENE COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANTS/ CROSS-APPELLEES:	M. MCINTOSH FORSYTH
ATTORNEY FOR APPELLEES/CROSS-APPELLANTS:	REBECCA C. TAYLOR
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
TRIAL COURT DISPOSITION:	ADVERSE POSSESSION FOUND; NO EASEMENT BY NECESSITY
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE McMILLIN, P.J., HERRING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

One group of landowners brought suit to have recognized an alleged easement by necessity over the lands of another set of landowners (the easement suit). The chancellor found no easement. In a separate suit (the confirmation suit) two of the first suit's defendants sought confirmation of title to the tract that the plaintiffs claimed in the first suit. The chancellor denied confirmation, finding title had been lost by adverse possession. The two suits were consolidated at trial. Each group of parties has either appealed or cross-appealed. We find no error and affirm.

STATEMENT OF FACTS

The property about which title is in dispute is that part of the N 1/2 of Section 13, Township 1 North, Range 7 West, in Greene County, that is south and east of a river. The chancellor found that adverse possession had perfected title to this property in Roger G. Beech, Peacos J. Beech, Brett Gilliam Hillman, Charles Horton Hillman, and Phyllis Turner Ishee (Beech, et al.). In the separate suit Beech, et al. sought to have recognized an easement by necessity across adjacent lands to the east and south owned by John Neal Kittrell, Rosa Lee Everett Kittrell and William H. McIntosh, all of whom were made defendants in the easement suit. The Kittrells are parties only in the easement suit. Beech, et al. asserted that they were land locked as well as blocked by the river that bordered on the north and

west and consequently an easement by necessity had arisen. Evidence was introduced that attempts to negotiate an easement had failed.

The complaint in the easement suit was filed first -- May 18, 1993. On July 28, 1993, William H. McIntosh, Jr. and Alice McIntosh Turner ("McIntosh") brought suit against the five plaintiffs in the previous suit and also against Ruth Marie Hillman, M. R. Hillman, and the State of Mississippi. The McIntosh claim was that they were the rightful owners of the "North Division of the Southeast fraction of Section 13." The record makes evident that the William H. McIntosh, Jr., who is a plaintiff in the confirmation suit, is the same individual as the William H. McIntosh, who is a defendant in the easement suit. The "North Division" used in the McIntosh tract description is initially ambiguous. Does it mean North half, some survey map reference to a division, or something else? Regardless, that division is solely in the southeast part (the word "quarter" is not used) of the section. Exactly what if anything this description means was addressed by a surveyor at trial as will be discussed below.

On June 7-8, 1994 the chancellor conducted a hearing on the consolidated suits. He entered judgment on December 30, 1994, finding that Beech, et al. had acquired title to the contested property by adverse possession despite record title in McIntosh. However, the court stated that no easement by necessity had arisen and "they must seek other relief within the law." This apparently was a reference to the right to seek an easement by necessity through proceedings conducted by the Board of Supervisors. **Miss. Code. Ann. §65-7-201 (Rev. 1991).** McIntosh appeals the decision regarding title, while Beech, et al. cross-appealed the decision regarding the easement.

DISCUSSION

1. Adverse possession

We will consider the adverse possession of this tract first. The first two deeds claimed to be in the Beech, et al. chain of title were in 1902 and 1938, but neither describes any land in the northeast quarter of the section. Finally in 1970 a deed for the N ½ east of the river appears to Lula Lee Hillman, wife of Horton Hillman. Thus they could not trace title to a patent and subsequent conveyances. The deraignment of title presented by McIntosh revealed that a predecessor received title to the North Division of the Southeast part of the section in 1899. Through various deeds the property became owned by W. H. McIntosh, Sr. in 1925, and after his death and the death of some of his heirs, W. H. McIntosh, Jr. and his sister, Alice McIntosh Turner, became the sole record title holders. In the complaint seeking to have title confirmed, the McIntoshes claimed that they went in to possession in 1954 and had continuously used the property since then.

Beech, et al. answered the confirmation suit complaint by stating that they were the owners of the N ½ of the section south and east of the river. Thus we now return to the issue deferred in the statement of facts of whether the legal description of the tract claimed by McIntosh is even the same tract described by Beech, et al. in their claim. The McIntosh deeds describe the property as the "North Division of the Southeast fraction of Section 13." A surveyor, over almost constant objections, admitted that he had rarely seen such a description, but by looking at original field notes for the governmental survey he was able to determine the meaning. "North division" and "southeast part" were terms used in the field notes and had a definite meaning that the surveyor then used in making his survey. The property described included all the N ½ south and east of the river.

There is a question of law whether McIntosh had record title to the disputed tract. An answer would require determining whether the description in the McIntosh conveyances is a valid, definite description. We need not reach that question. By the final judgment the chancellor found that Beech et al. had title to the N ½ of the section south and east of the river. That is a valid description and is the only parcel with which we are concerned on appeal. If we agree with the finding of adverse possession, the possible description defect in the McIntosh title is moot.

As for much of legal analysis, there is a multi-part test to apply. For adverse possession there are six questions:

1) is there a claim of ownership;

2) is possession actual or hostile;

3) has the possession been open, notorious, and visible;

4) has the possession been continuous and uninterrupted for 10 years;

5) has the possession been exclusive; and

6) has the possession been peaceful?

Rice v. Pritchard*, 611 So. 2d 869, 871 (Miss. 1992).** The party asserting title through adverse possession must prove the claim through clear and convincing evidence. ***Id. The chancellor found the evidence that Beech, et al. had possessed adversely to be clear.

The Beech, et al. possession began with a Greene County attorney named Horton Hillman and his wife. As mentioned above, a deed in 1970 is the first Hillman instrument. That deed and successive ones are a claim of ownership. There was testimony that Hillman used the property and granted rights to others to use it for hunting. Hillman or others on his behalf painted and flagged boundary lines. He sold timber off the property, had some of it surveyed, and sold part of the property to someone else. One of the Kittrell's, who are defendants along with McIntosh in the easement suit, testified that Hillman had told him in the early 1970's that he had purchased the land. He knew that Hillman was having the timber harvested.

To balance that, McIntosh had no evidence that he or any one else interrupted this possession, publicly disputed it, or engaged in similar use. On appeal McIntosh principally argues that the Hillman use and execution of instruments regarding the property was dishonest: "One would like to attribute these deeds to ignorance, but the unmistakable inference is that dishonesty was afoot even then." Regardless, the issue is not motive but whether adverse possession was effected. McIntosh also argues that there was no evidence that the land was placed on the tax rolls until the late 1980's. However, McIntosh acknowledges that the failure to pay taxes is not itself a hindrance to the ripening of title through adverse possession.

We find no abuse of discretion by the chancellor in his conclusion that by clear and convincing evidence ten years of adverse possession was proven.

2. Easement by necessity

The first of the two suits that together comprise this appeal was the effort by Beech, et al. to have recognized an easement by necessity across lands to the south and east owned by McIntosh or the Kittrells. The chancellor refused, stating that the right to the easement was not proven.

What Beech, et al. do not address in their brief are the requirements of such an easement. All that is alleged is that the N ½ of the section south and east of the river is bordered by the Kittrells, Mcintosh, and the river, with no access to a road. That does not prove the right to an easement in chancery court. The century-old starting point for determining whether an easement by necessity will be imposed is that the parcel blocked in its access to roads must at some time have had common ownership with the adjacent tract through which access is now sought. ***Taylor v. Hays*, 551 So. 2d 906, 908 (Miss. 1989).** It is an easement by necessity, but it also involves an implication. An owner of the larger, combined tract would not have wanted to isolate the interior tract; this is particularly clear if the former owner of all was the person retaining the interior tract, and the same result applies when the reverse occurs. ***Id.*** The right of way is only over land that once comprised the larger tract, and not over just any adjacent lands that might be a convenient way to a public road.

Beech, et al. have made no effort to show this former, common ownership. McIntosh claims ownership to that tract and also land contiguous to the south and alleges that no carving out ever occurred. Regardless, it is evident that no one asserts that the property of the Kittrells and McIntosh was once owned jointly with the N ½ east of the river and the common owner sold the interior, land-locked lands to Hillman, Beech, or anyone else in that fairly recent chain of title. The implication that arises for an easement by necessity is logical -- the owner of the whole would not want to isolate part. That logic has no application if the interior tract was not voluntarily carved out by the owner of the larger, but instead was acquired from the owner of the larger by adverse possession.

Because of our conclusion that an adverse possessor is not entitled to an easement by necessity in chancery court, even if this tract was once joined in ownership to the tracts across which Beech, et al. wish to pass the result still is that no easement is implied.

The chancellor found that Beech, et al. acquired title by adverse possession and not by being the record title owners through a long series of conveyances. They nonetheless have title to an apparently land-locked tract. Instead of having a free easement by necessity because of once being joined in ownership with the adjacent tracts, they are entitled to seek an easement through proceedings before the county board of supervisors. **Miss. Code Ann. § 65-7-201 (Rev. 1991); *Broadhead v. Terpening*, 611 So. 2d 949, 955 (Miss. 1992)**. If the requirements for the easement are proven, compensation has to be paid to the owner of the subservient estate across which access passes. ***Id.***

THE JUDGMENT OF THE CHANCERY COURT OF GREENE COUNTY IS AFFIRMED ON DIRECT AND CROSS APPEALS. COSTS ARE TO BE PAID ONE-HALF BY THE APPELLANTS AND CROSS-APPELLEES AND ONE-HALF BY THE APPELLEES/CROSS-APPELLANTS.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.