IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

FILED

July 27, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

**REECE HOWELL, III,
RICHARD HOWELL and
wife, MITZI S. HOWELL,**

Plaintiffs-Appellees,

Vs.

Lincoln Circuit No. 219-94
C.A. No. 01A01-9806-CV-00301

**C. WELDON HOWELL and
wife, LILLY L. HOWELL,**

Defendants-Appellants.

FROM THE LINCOLN COUNTY CIRCUIT COURT
THE HONORABLE LEE RUSSELL, JUDGE

John J. Archer of Nashville
For Appellees

Henry, Henry & Speer, P.C., of Pulaski
For Appellants

REVERSED IN PART, AFFIRMED IN PART AND REMANDED

Opinion filed:

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This appeal involves a dispute among landowners over two small parcels of property. Defendants/appellants, C. Weldon and Lilly Howell (collectively hereinafter "Weldon"), appeal the trial court's order partially granting judgment in favor of plaintiff/appellee, C. Reece Howell,

III (Reece).

The parties to this appeal are closely related as Reece and Weldon are nephew and uncle respectively. Reece owns approximately seventy (70) acres known as the North and South Patrick tracts (Patrick tracts) contiguous on the north and east with Weldon's land of approximately twenty (20) acres known as the UCL tract. A plat of the properties is attached as an addendum to this Opinion.

A brief history of the subject land is warranted. In 1936, C. R. Howell, Sr. (C.R., Sr.) purchased a tract of land of approximately twenty (20) acres from the Union Central Life Insurance Company. This property became known as the UCL tract. That same year C.R., Sr. sold the UCL tract but retained a strip of land approximately sixteen and one-half (16.5) feet wide and one thousand feet (1000) long that ran along the western border of the UCL tract. This strip of land became known as the Passway Parcel. C.R., Sr. also retained a small portion of land on the eastern boundary of the UCL tract which contained a spring and was known as the Springs Parcel or West Waterworks Parcel (Springs Parcel). In 1950, C.R., Sr. conveyed the Springs Parcel to Norman who subsequently conveyed it to Farrar.

C.R., Sr. died a widower in 1958. His will directed his executors, C.R. Howell, Jr. (C.R., Jr.) and Weldon, to sell all his real estate and distribute the proceeds equally among his nine children. At the time of his death, C.R., Sr. owned the Passway Parcel, yet his executors failed to sell it.

C.R., Jr., Reece's father, acquired title to the UCL tract and later sold it to his brother Don Stanley Howell (Stanley), Weldon's brother and Reece's uncle, in 1966. The deed transferring the UCL to Stanley specifically excluded both the Passway Parcel and the Springs Parcel.

C.R., Jr. died in 1988 leaving all of his real property including the Patrick tracts and the Passway Parcel to his wife, Reece's mother[1]. She in turn conveyed the Patrick tracts and the Passway Parcel to Reece by quitclaim deed in 1989.

In 1991, Stanley sold the UCL tract to his brother Weldon. The deed specifically excludes the Passway Parcel and the Springs Parcel. In 1996, Reece purchased the Springs

[1]C.R., Jr. apparently believed he owned the Passway Parcel in fee simple at the time of his death.

Parcel from the record owner Mary Alice Farrar Shideler.

No one disputed the use of the Passway Parcel until 1994. At a birthday party for one of the older members of the family, Reece told Weldon that he planned to put a mobile home for his mother and grandmother on part of the Patrick tracts.[2] Reece also told Weldon that he wanted to use the Passway Parcel as it was the easiest means of ingress and egress from the proposed area. The parties disputed the ownership of the Passway Parcel and discussion took place over the use of the strip of land.

The parties did not reach an agreement; however, Reece placed the mobile home on his property and began the placement of a waterline across the Passway Parcel. In retaliation, Weldon locked a gate from the road into the Passway which denied Reece access to the Patrick tracts by way of the Passway.

Reece, along with his son and daughter-in-law, filed suit for damages and to enjoin Weldon from interfering with their means of ingress and egress along the Passway Parcel. At this point both parties apparently believed that each owned the Passway Parcel outright by express deed. However, after checking the chain of title, Reece learned that the Passway Parcel should have been sold by the executors of C.R., Sr. estate in 1958. The failure of the executors to sell the property made all nine children co-tenants in the property. The trial court ordered Reece to join all the other co-tenants in the suit, but before he could do so, the owners of the other seven-ninths conveyed their interests to Weldon. Also, Reece's son and daughter-in-law conveyed their interests in their lot back to Reece, and the litigation involved a dispute between Reece and Weldon and his wife.

Subsequently, Reece amended his complaint to include a claim that he and Weldon owned the Passway Parcel as tenants in common. However, Reece also claimed that the Passway Parcel was an apparent, visible, recognized and necessary means of access to the Patrick tracts and thus he had an easement by implication. Further, he claimed that for at least thirty (30) years owners of the Patrick tracts have made open, notorious and actual use of the Passway Parcel, and thus a prescriptive easement existed. Finally, Reece claimed that Weldon had denied him access to the Springs Parcel by erecting a fence. Reece requested the court to order Weldon

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[2]Reece sold a small portion of the Patrick tracts to his son, Richard and his daughter-in-law. It was upon this small piece of land that the mobile home was placed.

to remove the locked gate denying access to the Passway Parcel, to grant him an easement across the Passway Parcel, and to enjoin Weldon from trespassing on the Springs Parcel.

Weldon answered Reece's complaint and filed a counterclaim which asserted ownership of the Passway Parcel by adverse possession, asked for damages in the amount of $25,000, and in the alternative, asked that if the easement is granted by the court that the easement be one for ingress and egress only and forbidding the placement of a water line. In Weldon's answer to the amended complaint, a claim was made for all property located within the fenced boundaries of the UCL tract including the Springs Parcel.

After a trial on the merits with testimony of numerous witnesses, the trial court issued an order which stated in pertinent part:

ORDER

> This cause came to be heard on the 19th day of March, 1997 before the Honorable Lee Russell, Judge, 17th Judicial District (Part II), upon the Complaint and Amended Complaint filed by the Plaintiffs, the responses of the Defendants thereto, the counter-claim filed by the Defendants, the response of the Plaintiffs thereto, the opening statements by counsel of record, the testimony of witnesses for all parties in open court, the deposition testimony of various witnesses, and upon the entire record from all of which the Court finds as follows:
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> * * *
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> 6. Each party now claims to own the Passway in its entirety by various theories of adverse possession or prescription. Each side claims that they have been damaged by the other side's use of the property since the dispute began. Plaintiff Reece Howell claims that the Defendants owe him money for land rental, unrelated to the boundary dispute, and the Defendants counter that they should be credited for expenditures for fence repair done. The Defendants claim that the Defendant wife's longhorn cattle had horns damaged due to their frightened reactions to the Plaintiff's traffic on the Passway. The Defendants complain that the Plaintiffs placed a waterline on the Passway, thereby damaging it. The Plaintiffs have amended their Complaint to seek resolution of an alleged dispute over an additional small parcel on the boundary between Reece Howell's property and that of Weldon Howell.
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> * * *
>
> 10. The Plaintiffs and the Defendants are relative newcomers to any claim of ownership to the Passway, taking their deeds in 1989 and 1991 respectively. However, there was abundant proof at trial about the use of the Passway during the ownership of the parties' predecessors in title. This trial court concludes that the Passway and the balance of the UCL property were not separated by any fence and that the owners of the UCL

property and their renters generally made use of the Passway for agricultural purposes. At times during the period since 1936 the UCL tract was row cropped and the crops were planted up to the fence on the west boundary of the Passway, so that the Passway was at times cropped by the owners or renters of the UCL tract. At other times, the owners or renters of the UCL tract ran livestock in the Passway.

11. On the other hand, this trial court finds that periodically the Passway was used as a means of access for the owners or renters of the Patrick tracts to have access to that property from Prospect Road. At times the Passway was not cropped to the fences so that access was possible, and at times there appeared to be a crude road along the Passway. The predecessors in title of the parties here, and the renters from those predecessors in title, generally did not obtain the permission of the predecessors in title of the other parties to make use of the Passway. The various uses of the Passway apparently generated no friction, no adverse claims until the 1990's.

12. The proof in the case will not support an abandonment of the Passway by C.R. Howell, Sr., or by those who inherited from him. The parties to this litigation and the other residuary beneficiaries of C.R. Howell, Sr., were therefore co-tenants of the Passway. As such the possession of the Passway would not be adverse to each other unless one party communicated to the others an intention to the co-tenancy of the other party, to attempt an ouster of the other co-tenants. . . . The evidence in the present case is devoid of any such expression of intention to claim an adverse interest or to accomplish an ouster, at least before Reece Howell's mother purported to convey the entire Passway. Everyone assumed ownership of the strip, incorrectly as it turns out, but no one attempted to exclude anyone else from exercise of joint ownership. No one challenged anyone else's use of the land until the 1990's.

* * *

14. The Plaintiffs claim an interest in or prerogatives for use across the Passway based on necessity or implication. The claim is made that the Passway is the only practical access that the Plaintiffs have to the "mesa" or western portion of their property. Although the western portion of the Plaintiff's property is in fact higher than the rest of the property and more easily accessed by the Passway, the proof at trial will not support the proposition that the Passway is the only practical access to the mesa. The evidence is overwhelming that other routes up to the mesa are available and have in fact been used and are practical even for light vehicle traffic.

15. As to the Passway, this trial court finds that neither side has suffered any damages as a result of the other co-tenants using the property in a manner inconsistent with the other parties' use of the property. The testimony on the injury to the longhorn cattle was, in addition, highly speculative. The rental agreement is found to have been for a period of nine and a half months, and credit is given to the Defendants for the expense of the fencing. As to the issue of the other parcel of property, the "West Waterworks" property, it is held that parcel as it appears on the

> survey, Exhibit 2, belongs to the Plaintiffs. The proof in this case does not support a claim by the Defendants to that property by adverse possession or otherwise.
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> 16. The final issue is how to deal with future use of the passway now that it has been adjudicated to belong one ninth to the Plaintiffs and eight ninths to the Defendants. Arguably the parties could be left as joint tenants until such time as a partition is sought, but their proposed prospective uses of the property appear to the court to be so inconsistent that continued co-tenancy would guarantee future conflict and litigation. The property could not practically be partitioned, the Plaintiffs have no practical use for less than all of the Passway and the threat to the Defendants' cattle being the same if the Plaintiffs have use of any portion of the Passway. The Passway will therefore be sold with one-ninth of the net proceeds going to the Plaintiffs and eight ninths to the Defendants. If parties cannot agree to a private sale, then the property will be sold by the clerk.

Weldon appeals the order of the trial court and requests this Court to determine the following issues presented in appellants' brief:

> I. Whether the defendant Weldon Howell owns the Passway Parcel by adverse possession.
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> II. Whether the defendants own the Springs Parcel by adverse possession.
>
> III. Whether the defendants' counter-claim for damages should have been sustained. . . .

Reece also presents the following issues in his brief:

> 1. Whether the plaintiff Reece Howell, III, owned an easement for ingress and egress over and across the passway parcel?
>
> 2. Whether the trial court erred in ordering a sale of the Passway Parcel, although none of the parties asked for a sale of the Passway Parcel or requested relief of that nature or type?
>
> 3. Whether the court erred in finding that the plaintiff Reece Howell, III, owned a one-ninth (1/9) interest in the Passway Parcel instead of a one-eight[h] (1/8) interest?

Since this case was tried by the trial court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

I believe that a brief discussion of interests may be helpful in determining the preponderance in the present case.

Danny Shelton a native of Lincoln county and a cattle farmer, worked for the Reece brothers during

owned the FCC and Patrick tracts in the 1970's. He then owned the Patrick tracts by self from 1984 to 1992. He testified by deposition that beginning in the early 1970's until the late 1970's he used the Passway Parcel to access the Patrick tracts from Prospect Road at least once a week. He further claims that the Passway Parcel appeared to be a field road, and he did not recall it ever being planted over.

Jerry Delap nephew of C.J., Jr. and Estelle, testified by deposition that he and his brother owned both the FCC and Patrick tracts from Stanley Powell from the early 1970's until the late 1980's and continued to own only the FCC until 1994. He claims that the FCC tract was planted in cotton all the way up to the western fence line and that the Passway Parcel was also planted over. He stated that there was no vehicular ban road ever existed on the FCC until the late 1970's when he used the Passway Parcels for tractors to access the Patrick tracts in order to run cotton bags.

James V. Beyer a professional land surveyor, testified that he prepared a survey of the FCC and Patrick tracts for Reece. He also testified that in 1977 he used the Passway Parcel to access and survey the property to the east of the FCC and Patrick tracts. He stated that it appeared to be a farm road, and that during the few days he used the Passway he saw other people using it to access the Patrick tracts. As to the Spring Parcel, Beyer testified that he surveyed it prior to trial and observed an old fence that had grown into the trunk of several trees bisecting the parcel. He observed that part of the fence was rebuilt with new wire and posts.

Reece Howell, III the plaintiff in this action, testified that he was 58 years old and had lived near the disputed property for 40 years before moving. He testified that he began to prepare to use the Passway Parcel as an access to the Patrick tracts for hunting and hauling. He stated that for as long as he could remember there existed an old dirt road that existed along the northern boundary of the Passway leading into the Patrick tracts. His earliest recollection of using the Passway Parcel is approximately age 11 or 12 or the mid 1960s.

Reece testified that he had spoken with Patrick before and the Passway Parcel, and that he believed his mother had the power to transfer title to the Passway Parcel following his father's death. As to Estelle's grant to some of the other family members, Reece appreciated Estelle and felt like she had planted in places that ran across part of the Patrick tracts that he had sold to his son Richard, and that he wanted to run a roadline along the Passway Parcel. Estelle objected and locked the gate allowing access from Prospect Road to the Passway. Reece then spent $1,111.11 fixing another access road to the Patrick tracts to make it passable. Reece knew that Larry Shelton, the Delap brothers and had surveyors, John T. Hite and Beyer had used the Passway Parcel at different times. He denied telling Estelle that he wanted to purchase a 10.5 foot strip of land on the west side of the FCC during a conversation in 1994.

As to the Spring Parcel, Reece testified in pertinent part that a Spring Creek was located there that supplied

water in the Parrish tracts. He stated that his father, C.L., Jr., maintained the hydraulic ram from any point before he died. The Springs Parcel was used to water cattle by people on both the LCL and Parrish tracts and he never noticed a permanent fence in place.

Jeanette Howell testified that the access road leading to the section of the Parrish tracts is difficult to travel.

Gordon Shelton, age 71, testified that he had lived in Lincoln County near the property in question all his life. He had first logged the Parrish tracts for C.L., Jr. for 14 or 15 years beginning in 1961 and ended by hauling wood off the Passway Parcel. He ran a bulldozer on the Passway Parcel approximately 5 or 6 times per year for C.L., Jr.'s request. He knew that Danny Shelton used the Passway Parcel to access the Parrish tracts when hunting or cattle.

Richard Howell (son of Bruce), testified that he is an original plaintiff in this case in that he purchased a parcel of land located on the Parrish tracts from his father, Jackson Howell, the parcel in Bruce. The parcel he purchased from Bruce was originally to be the location of a house but is undeveloped presently, and the discussion of this sale and the subsequent phone precipitated the confrontation in this case. He has used the Passway Parcel to access the Parrish tracts from the time he was 7 years old until the present (he is now 37).

Randy Delap (nephew to Stanley and Wallace), testified that he owned and worked cattle in the LCL tract and cattle in the Parrish tracts during the 1970's. He initially accessed the Parrish tracts from a dirt road on the east side of the property. However, in the mid-1970's he began to use the Passway Parcel to bring hay bales from the Parrish tracts. He did not recall ever acquiring the Passway. He stated that he and his brother hauled the LCL tract hay bales on to Bruce one and over the Passway, and there was no evidence of a road before they began to exit the Parrish tracts when they harvested hay.

Thomas Simmons, a lifelong resident of Lincoln County, testified that he owned parcel of the Parrish tracts he acquired in early 70 years beginning in 1971. He accessed the property by a dirt road off Liberty Road from the east. This dirt road provided good access to the Parrish tracts, and he did not have any problems getting around the property. In the early 1980's, he began to use the gate at the north entrance of the LCL tract to access the Passway Parcel about four times a year.

From the Springs Parcel, Simmons testified that there was an old fence that divided the parcel, but that it was down in a few places and the cattle could freely move from the Parrish tracts in the spring.

William Simms testified that he believed hay in Wallace's shop the eastern boundary of the LCL tract approximately 5 times in 1995 and authenticated photographs of visible evidence of a farm road.

Don Stanley Howell (brother of Wallace and uncle of Bruce), testified that he owned the LCL tract from

1966 to 1990 when he sold the property to Weldon. He did not own the property recently, and the fences that were there now are in the same location that they were when he owned it in the 1980s and 90s. When he purchased the property in 1966, he understood that he had purchased the land from "fence to fence" and that is what he thought he sold to Weldon. He did not think that any rights-of-way existed through the LCC. He gave permission to C.M., his son-in-law, to use the Spring Parcel. He did not intend to give access to the boundary of the Spring Parcel and the Patrick mobile home park. While he owned the LCC tract, crops and occasionally hay, and cows were moved and grazed on the entire tract from fence to fence and the Spring Parcel was planted in corn.

From the Spring Parcel, he testified that he had recently examined the fence splitting the Spring Parcel, and it was in the same location as he knew it to be in 1966. He described the fence as old and that it had grown into the trees that grew along it.

On cross-examination, Stanley testified that he was in the military from 1951 to 1953 and then retired to Europe, Florida until 1965. He did not purchase the LCC as an improvement and owned the land in others. In 1990, he moved back to Roswell Hill after selling the LCC to Weldon.

Weldon Howell the defendant-appellant, testified that he was born in 1951 and had lived his entire life in the general area around the contested land. He stated the fences on the LCC were in the same position as they were when he was a child. He described the fence through the Spring Parcel as very old and in the same position as he remembered from the age of 15 or 16.

He testified that the only person to ask his permission to use the Spring Parcel was his nephew, Danny Howell, who used it to access an owner else's property to deer hunting. He claimed that Bruce offered to buy a strip of land across the LCC so that he could access the Patrick mobile home property. He refused to sell but knew he would have to grant Bruce an easement for access over the LCC.

From Bruce's unpermitted attempts to buy a portion of the Patrick tract, Weldon testified that he repaired the fence bordering the parties' property after an ice storm and realized his mistake in the location of fence. He hired two men that worked for three days clearing fallen trees and limbs from the fence. Weldon said that his expenses amounted to $744.00 which he deducted from the rent he owed. The expenses included paying the hands, a meal, chainsaws, gasoline for the fence, and new fence posts.

Gary Francis Howell nephew of Weldon, testified that he had lived all 51 of his years around the land in question. He said there was never any evidence of a farm road on the LCC, and he never noticed anyone traversing the eastern boundary of the LCC where the Spring Parcel is located. He stated that he had heard of a well that was called Bruce's and it appeared in the Patrick mobile home park and was where it was supposed to be located. He said the

Springs Parcel, he testified that the fence bisecting this area is in the same location that he remembers it to be in 1968.

Arden Smith Humphrey sworn and testified, testified that she grew up in the area adjacent to the area in question and remembers no evidence of a dirt road on the western boundary of the LCL. She stated that she had overheard a conversation between Heller and Beers, where Beers wanted to purchase a parcel of the LCL. As to the Springs Parcel, she testified to seeing the fence approximately 15 years before and heard a bottle-rocket through the center of the fence and she initiated on the diagram of the properties.

Maude Smith sworn and testified, testified that she lived adjacent and between the two tracts in question since 1961. She testified only to her peripheral to the Passway Parcel, and it still resembled like a roadway. The fence along the Passway is currently those that brought from equipment in use. Further, the LCL was planted four fences in fence, but there was not one to bother the Passway as planted over account.

As to the Springs Parcel, she testified that she had seen the fence bisecting the parcel recently, and that it was in the same place that she had always seen it located. As to the last age to the long horn cattle, she testified that the cattle would run up to the corn crib near the Passway.

Lanny Howell stepson of Heller, testified that in 1994 he used the Passway Parcel as a construction entrance on some else's property, but that he first asked Heller's permission. At the time there was not a visible road on the LCL, and he did not know of anyone else accessing the Parcel tracts through the LCL. As to the Springs Parcel, he testified that he helped C.L., Jr. erect on the "new" in the 1970s, and the fence is still located in the same place.

Lilly Logan Howell wife of Heller, testified that there was a road in her that her and Heller had a fence along the western boundary of the LCL. As to the last ages, she stated that she raised 12 head of Texas long horn cattle on the LCL for about a decade spanned by the laying of the waterline and the increased traffic on the Passway Parcel. She recalled the cows that broke loose during this time. One cow was out around 4:00 before the barbecue, barely 8:00 after; another cow out 12:00 barely 1:30 after the barbecue; and finally one cow out 4:00 but could not bring after the barbecue. Also, the cows calve between eight, and they were forced to purchase more pasture and hay for 6 months as a result 2011.

In response to inquiry, Lilly testified that she did not see any of the cows that open the instrument from the injuries incurred.

In his first issue Heller contends that he has obtained title to the Passway Parcel by adverse possession. The trial court ruled, and we agree, that when C.L., Sr. died in 1981, and the Passway Parcel was not still acquired by him ill, all of C.L., Sr.'s children began to use it as a means to access their land. Ultimately, a necessity is presumed to be built on behalf of the seller and all others' accounts, and therefore the possession of one tenant in co

is not ordinarily held to be hostile to the co-tenants. ***Moor v. Cole*** [redacted].

This Court stated the general rule as to adverse possession by co-tenants in ***Valley v. Lambuth*** [redacted]:

> The rule seems to be that the holding of a co-tenant, openly, notoriously, exclusively, and excluding all rights of co-tenancy, by cultivating the land, collecting the rents, excluding the land, making improvements, selling timber, paying the taxes, for a long run of years, at least recovering the period required by statute of seven years, or by prescription of twenty years, with the full knowledge of the co-tenants, and in settlement of the conflicting interests and pretensions, the co-tenants not being under any legal disability, and with full notice and knowledge upon the part of the co-tenants of such adverse holding and claim by the tenant in possession, would constitute an actual ouster.

Weldon argues that he and his predecessor's in title held the land openly and exclusively against all the other tenants in common and have therefore ousted them. We believe, however, that the case of ***Denton v. Denton*** [redacted] is on point and controlling upon this issue.[3] In the above entitled case, [redacted] became the owner in 1944 vested by 14 children and creditors and having a life estate in [redacted]. In 1961, [redacted], one of [redacted]'s sons, purchased the farm at a tax sale and lived and worked there until 1971 when he brought [redacted] filed suit alleging they were co-owners of the farm.

The trial court held that adverse possession by one co-tenant can only be established when the co-tenant has been excluded from the property by the co-tenant's possession. On appeal, the Court began by stating that adverse possession by a co-tenant is possible, but that it must be specifically pled with "the single issue of whether the rights of the respective parties where one co-tenant holds possession and both he and the other co-tenants are ignorant of the existence of the co-tenancy." ***Denton*** [redacted].

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[3] Weldon's brief discusses and attempts to differentiate the ***Denton*** case by stating:

> The Denton Court acknowledges the rule as stated in Am. Jur. 2nd, p. 260 Adverse Possession, Section 173:
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> "Although there is considerable confusion in the cases as whether there can be adverse possession by a co-tenant where he or his co-tenant or both are ignorant of the co-tenancy, on principle it would seem that one who holds sole possession of premises as the exclusive owner has a possession which is adverse to the whole world, including his co-tenant out of possession whether either or both were ignorant of the co-tenancy; and accordingly in a number of cases possession has been deemed adverse although both parties are unaware of the co-tenancy". [sic] (Cases and citation thereunder omitted).

However, Weldon failed to include the very next line from the ***Denton*** case which states: **"This, however, is not the rule in this jurisdiction."** ***Denton***, 627 S.W.2d at 127. Appellants' assertion in the brief is misleading, to say the least. Counsel should carefully scrutinize court filings to avoid such an occurrence.

The *Denton* court held that tenants-in-common are ignorant of the co-tenancy rule and can be ousted, and the property cannot be adversely possessed. The *Denton* court said in pertinent part:

> The leading case in this jurisdiction on this issue is *Hydas v. Johnson*, 11 Tex. App. 111, 111 S.W. 11 (1111). In that case J. L. Beasley and wife, Mary, purchased a piece of property in 1911. Under the law as it existed at that time, each acquired a one-half undivided interest in the property. J. L. Beasley died intestate in 1111 survived by his wife and children. Thereafter, until Willie Beasley continued to occupy the property until the death of Mary Beasley in 1111. Mary Beasley left a will willing the property to Willie Beasley. It further provided that the west one-half of the property be given to Willie's brother's children and the other half be vested in equal shares in the other children. Willie continued to live on the property, having improvements and erecting improvements. All of the parties were of the opinion that the deed of 1111 created an estate by the entireties and Mary's will gave Willie title to the entire property. The suit by petitioners the chancellor held that Willie's holding of the property was antagonistic to the other heirs. The court of appeals, in reversing the chancellor, said at 111:
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> > 'In this case, as in *Drewery v. Nelms*, 111 Tex. 111, 111 S.W. 111, the defendant merely occupied the property, appropriating the rents, and sold a small amount of timber valued at 111 without asserting possession adverse to cotenants nearby. Does the circumstance that the parties lawfully thought to own the entire property by virtue of the will of his mother affect a distinction between this case and this? We think not. There was no notice to complainants of hostile possession by defendants sufficient to excite investigation and assertion of their rights and it is this which the law requires before the cotenant's possession, purely friendly possession can be converted into one of a hostile character. Defendant has not shown that he has been injured by complainants' failure to assert their rights. On the contrary, he has had the full use of the property and, under the Chancellor's decree, he has been exempted of any liability to account for rents and profits during his occupancy. Under the circumstances, we do not see that there has been any conscious acquiescence on the part of complainants and we find upon the Chancellor was correct in not limiting the bill because of laches based wholly upon the lapse of time.'

Denton, 111 S.W.2d at 111, 111.

The issue presented and decided by the *Denton* court is precisely the issue in the case before this Court: whether parties ignorant of the fact that they are co-tenants can oust one another and adversely possess property. The *Denton* court found that they could, and we agree.

Further evidence was presented at trial that Lucy and his predecessors in title never received rent from the house or lot, and in fact, used the only access to and egress from the rental house. The testimony established preponderance against the trial court's finding, and we agree that under the facts there was no tenancy. Fellow's co-tenants, and, therefore, Fellow did not hold the house or lot adversely to them. *Moore v. Cole*, 111 Tex. 11, 111 S.W.2d 111 (1111); *Hallmark v. Tidwell*, 111 S.W.2d 111 (Tex. App. 1111).

Pierce now asserts Fuller's second counterclaim that he and his predecessors in title have adversely possessed a portion of the Springs Parcel. As noted earlier, the Springs Parcel is an all-metes-and-bounds tract described partially within the fenced boundary of the LCC tract and partially within the Daniel tract. It was specifically excluded from the deed to the LCC tract in 1916 when it left the Fussing Parcel. However, the Springs Parcel was owned by C.J., Sr. in 1951 with the powers Pierce obtained the Springs Parcel from the third person and recorded the deed in 1998. Pierce is now asserting it can now own it if Fuller is this case.

Fuller also claims that the small portion of approximately seven-tenths (.7) of an acre located within the fenced boundary of the LCC has been used continuously and openly by owners of the LCC for more than ten (10) years. The testimony at trial supports this contention. Pierce contends although this issue was not presented in either Fuller's answer or counterclaim, it was tried and determined at the trial level without objection by Pierce, and the pleadings are considered amended accordingly.

"To establish title by adverse possession, there must be occupation of the property under a claim of right or title which is open, actual, continuous, exclusive, adverse and notorious for the prescriptive period of 10 years." ***Catlett v. Whaley***, 111 S.W.2d 544, 546 (Tenn. App. 1937). *See also* ***Coal & Iron Co. v. Coppinger***, 51 Tenn. (Pickle 11) 511, 513-14 (1895); ***Tidwell v. Van Deventer***, 111 S.W.2d 1111 (Tenn. App. 1914).

Several witnesses testified that the fence bisecting the Springs Parcel had been in the same location as it is now since the 1950s and 60s. The evidence established that Fuller has been in open, public, hostile and adverse possession of the land in question for more than 10 years without challenge by the legal owners and acquired title by adverse possession to the fenced-in area of the Springs Parcel. The evidence presented at trial preponderates against the trial court's finding on this issue, and Fuller has acquired a fee simple absolute title to the land in question.

Fuller next contends that his counterclaim for damages upon the cattle should have been granted. Pierce argues that Fuller did not request damages in the cattle in his counterclaim; however, the issue was tried by the lower court, Pierce raised no objection, and thus the issue is deemed tried by consent.

The trial court found that the proof presented was too speculative to award damages. We agree. Fuller testified as to the damages that the cattle suffered, but she did not see the injuries occurred and only speculated that traffic across the Fussing Parcel was the cause. There was no other evidence to support the trial court's finding on this issue.

Pierce next asserts Pierce's first issue asserting that he holds an easement by implication for access and ingress over the Fussing Parcel. The trial court ruled that no such easement existed, and the evidence supports this holding. Pierce

and Heller hold the mineral interests in common. In a co-tenancy, the possession of one is the possession of all, and the possession of one cotenant of the whole, in itself, is not adverse. ***Cunningham v. Roberson's Lessee*** 11 Tex. (1 Dallam) 131 (1853); ***King v. Rowan*** 17 Tex. (17 Rich. L.) 173 (1873). "Each has the undivided right to the possession, and the title of each inures to the whole." 1 Tex. Jur. ***Cotenancy*** § 8 (1959). Any act of a co-tenant in derogation of the common estate and the possession of the whole thereof, adversely to the equal rights of the co-tenant, or the possession may ripen into an adverse title. ***Garland v. Holston Oil Co.*** 11 Tex. App. 111, 113 S.W. 2d 814 (1934).

In a co-tenancy, each has the right to use the land as he wishes as long as his use does not interfere with the other's use, and there is no need for an accounting of any kind. Heller argues that the trial court should have ordered the royalties placed by Lee on the Ramsey Parcel returned. Lee, as co-tenant, has the right to use the tract, and there has been no showing that such use interfered with Heller's use of the Ramsey Parcel.

Lee next raises the issue of whether the trial court exceeded its power in ordering the sale of the Ramsey Parcel. However, Lee does not discuss this issue in his brief. Thus, we deem this issue waived and will not consider it. ***State ex rel Dept. of Transp. v. Harvey,*** 811 S.W. 2d 141, 145 (Tex. App. 1991).

Lee's final issue asserts that he owns a one-eighth (1/8) interest in the Ramsey Parcel instead of the one-ninth (1/9) interest found by the trial court. It appears that the parties in this suit as well as the trial judge failed to realize that only eight of the original nine children of T.A., Sr. are still living at the time of trial. In 1971, Lee Powell, son of T.A., Sr., died intestate and survived only by his wife. The record is unclear as to the percentage of ownership. Therefore, this issue is to be remanded to the trial court in order to hold a hearing on this matter and determine the correct ownership percentages in light of the new information.

The judgment of the trial court that title to the Ramsey Parcel is vested in appellee is reversed, and title to said parcel out of the existing leases is vested in appellants. The case is remanded to the trial court for such other proceedings as are necessary including a determination of the correct percentage of ownership of the Ramsey Parcel. The judgment is affirmed in all other respects. Costs of the appeal are assessed one-half to appellant and one-half to appellee.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE