BONA FIDE PURCHASER DUTY OF INQUIRY

12 California Supreme Court Cases

1. ***Pell v. McElroy***, 36 Cal. 268, 1868 Cal. LEXIS 186 (1868):

- The fact of open, notorious, and exclusive possession and occupation of lands by a stranger to a vendor's title, as of record, at the time of a purchase from and conveyance by such vendor out of possession, is sufficient to put such purchaser upon inquiry as to the legal and equitable rights of the party so in possession, and such vendee is presumed to have purchased and taken a conveyance from the vendor with full notice of all the legal and equitable rights in the premises of such party in possession and in subordination to these rights; and this presumption is only to be overcome or rebutted by clear and explicit proof on the part of such purchaser, or those claiming under him, of diligent, unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable rights in the premises in behalf of the party in possession. And when the location of the lands is such as to render personal application to and inquiry of the occupant practicable, a purchaser failing to make such application and inquiry is no more entitled to be regarded a purchaser in good faith than if he had so inquired and ascertained the real facts of the case.

- Such, we understand, is the well settled general rule of law in this State, sustained by preponderant authority of American and English Courts. (Hunter v. Watson, 12 Cal. 363; Lestrade v. Barth, 19 Cal. 675; Dutton v. Warschaur, 21 Cal. 609; Landers v. Bolton, 26 Cal. 393; Fair v. Stevenot, 29 Cal. 486; Killey v. Wilson, 33 Cal. 693; Woods v. Farmere, 7 Watts. 386; Williamson v. Brown, 15 N. Y. 355; Grimstone v. Carter, 3 Paige Ch. 420; Tuttle v. Jackson, 6 Wend. 213; Gouverneur v. Lynch, 2 Paige Ch. 300; Chesterman v. Gardner, 5 Johns. Ch. 29; Buck v. Holloway, 2 J. J. Marshall, 180; Barbour v. Whitlock, 4 Monroe, 196; Hopkins v. Garard, 7 B. Monroe, 312; Pritchard v. Brown, 4 N. H. 404-5; Colby v. Kenniston, 4 N. H. 266; Allen v. Anthony, 1 Merv. 282; Taylor v. Baker, Daniels, 80; 2 Vesey, 437; 13 Vesey, 118; 16 Vesey, 249; 17 Vesey, S. C., 433.)

- In the present case the question arises, whether the fact of open, notorious, and exclusive possession of lands by a vendor thereof, after transfer of his legal title thereto by deed, is sufficient to put a subsequent vendee of the same premises, while so in possession of the original vendor, upon inquiry as to the equitable rights of such original vendor, and subject such subsequent purchaser to the same rules as when a stranger to the title of his vendor, as of record, is in possession. Upon this point, as in regard to the rule heretofore stated, the authorities are somewhat conflicting.

- The simple, independent fact of possession is sufficient to raise a presumption of interest in the premises on behalf of the occupant. And we can discover no just or rational ground for giving to this fact less significance as notice to a party purchasing the legal title from one not in possession, in consequence of the fact that such occupant had by deed divested himself of the legal title.

- ***An absolute deed divests the grantor not only of his legal title, but right of possession***; and when such grantor is found in the exclusive possession of the granted premises long after the delivery of his deed, here is a fact antagonistic to the fact and legal effect of the deed; and we cannot appreciate the justice, sound reason, or policy of a rule which would authorize a subsequent purchaser, while such fact of possession continues, to give controlling prominence to the fact and legal effect of the deed, in utter

disregard of the other notorious prominent antagonistic fact of exclusive possession in the original grantor. He cannot be regarded a purchaser in good faith who negligently or willfully closes his eyes to visible pertinent facts, indicating adverse interest in or incumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case.

- We prefer to adopt the more rational doctrine announced by Mr. Justice Selden, in delivering the opinion of the Court in the case of Williamson v. Brown, 15 N. Y., supra. Says that learned Judge: "The true doctrine on this subject is, that when a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, ***he is presumed to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a bona fide purchaser***."

- ***The continued exclusive possession of a vendor after his formal conveyance of the legal title is a fact in conflict with the legal effect of his deed, and is presumptive evidence that he still retains an interest in the premises, and is sufficient to put a purchaser upon inquiry, and subject him to the general rule heretofore announced in case of the party in possession being a stranger to the title as of record***.

2. ***Scheerer v. Cuddy***, 85 Cal. 270, 24 P. 713; (Cal. 1890):

- The ***actual possession of the premises by the appellant was sufficient*** to put the respondent upon inquiry as to the nature and extent of its claim. (***Pell v. McElroy***, 36 Cal. 268; O'Rourke v. O'Connor, 39 Cal. 446; Moss v. Atkinson, 44 Cal. 9, 17; Hunter v. Watson, 12 Cal. 363; 73 Am. Dec. 543; Lestrade v. Barth, 19 Cal. 660, 675; Dutton v. Warschauer, 21 Cal. 610; 82 Am. Dec. 765.)

- The effect of such possession, and the diligence required of the vendee to ascertain the extent of the claim of the party in possession, is thus clearly stated in ***Pell v. McElroy***, 36 Cal. 268.

- The fact of open, notorious, and exclusive possession and occupation of lands by a stranger to a vendor's title, as of record at the time of a purchase from and conveyance by such a vendor out of possession, is sufficient to put such purchaser upon inquiry as to the legal and equitable rights of the party so in possession, and such vendee is presumed to have purchased and taken a conveyance from the vendor with full notice of all the legal and equitable rights in the premises of such party in possession and in subordination to these rights, and this presumption is only to be overcome or rebutted by clear and explicit proof on the part of such purchaser, or those claiming under him, of diligent, unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable rights in behalf of the party in possession.

- And when the location of the land is such as to render personal application to and inquiry of the occupant practicable, a purchaser failing to make such application and inquiry is no more entitled to be regarded a purchaser in good faith than if he had so inquired and ascertained the real facts of the case.

- ***Whether the respondent knew of the appellant's possession, or not, is immaterial. It was his duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact must be regarded as the strongest evidence of bad faith on his part***. The burden of making the proper inquiry was cast upon him by the mere fact of actual possession on the part of the appellant.

- If it were allowed that by failing to acquaint himself with the fact of possession on the part of another than the vendor the vendee could avoid the effect of the rule above stated, ***he could purposely avoid any inquiry on the subject, and thereby evade the rule and its consequences entirely***.

3. ***Hyde v. Mangan***, 88 Cal. 319, 26 P. 180; (1891) (applied bona fide purchaser doctrine in the context of an equitable mortgage):

- The plaintiff came into court in this action with full notice of all the rights and equities existing between the railroad company and the defendants, and between Brownstone and his assignees and the defendants; for the defendants were in the open, notorious, and exclusive possession of this land at all these times, and plaintiff made no inquiry to ascertain the rights or claims of defendants, and he is in no better position, and no more entitled to be regarded as a purchaser in good faith than if he had so inquired and ascertained the real facts of the case. (***Pell v. McElroy***, 36 Cal. 268; Bank of Mendocino v. Baker, 82 Cal. 114; ***Scheerer v. Cuddy***, 85 Cal. 273.) Neither could the plaintiff be recognized as a bona fide purchaser from his assignor, Erlanger, upon the additional ground that in the sale of equitable interests the principle of bona fide purchasers has no standing. (Taylor v. Weston, 77 Cal. 534.)

4. Emeric v. Alvarado, 90 Cal. 444, 27 P. 356 (1891):

- It is to be observed that ***the statute makes no exception in favor of a party in possession; and the courts had to exercise some liberality of construction to make such exception***. The philosophy upon which it was founded was this: That where a third party was in the open and conspicuous possession of the land conveyed, with nothing to indicate that he was not holding adversely to the grantor, the grantee, although a purchaser "for a valuable consideration," should not, in view of such pronounced hostile possession, be deemed to be a purchaser "in good faith." But the authorities on the subject in this state, many of which are cited in the briefs, go only this far: that such possession is evidence of notice, and puts the purchaser on inquiry. It is not, ipso facto, notice, but merely evidence tending to show notice.

- The first thorough discussion of the subject in this state is to be found in Hunter v. Watson, 12 Cal. 363; 73 Am. Dec. 543. In that case the learned Justice Baldwin, in delivering the opinion of the court, says that the question is "full of embarrassment," and comes to a conclusion with great hesitancy. He suggests "whether the statutes of registration should not be thoroughly revised, so as to secure uniform and certain rules for the disposition and protection of real estate in the future." After reviewing the authorities, he says that "some of the cases hold that mere possession is actual notice, and will not suffer any proof to be made to the contrary; others, and perhaps the greater number, hold that it is only a presumption of notice, which may be rebutted; and others, again, hold that the possession is not so much notice of the title of the holder, as a circumstance which should put the purchaser on inquiry"; and the utmost conclusion to which he comes is, that "open, notorious possession of real estate, by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee's title," and that "the possession must exist at the time of the acquisition of title or deed of the subsequent vendee.

- "The rule, however, was modified and more fully explained in subsequent cases. Fair v. Stevenot, 29 Cal. 489, is a leading case on the subject. In that case Mr. Justice Rhodes, delivering the opinion of the court, discusses the question very thoroughly, and says, among other things, as follows: "The fact of possession is only evidence tending to prove notice. Neither the recorded deed in the one case, nor the possession of the grantee of the unrecorded deed in the other, is the ultimate fact, but notice is the

ultimate fact to be established by the evidence. Upon proof being made of the record of the deed, the notice necessarily results by operation of law; but not so upon proof of the possession, for the possession may be taken and held in such various modes, and accompanied by so many qualified circumstances, that each case must depend upon its own peculiar features, and therefore proof of possession is not decisive, without regard to the other facts of the case." In Pico v. Gallardo, 52 Cal. 206, the court cites Fair v. Stevenot, 29 Cal. 489, and says: "The court below found that at the date of the sale and conveyance to plaintiff, the defendants were in possession of the demanded premises. Such possession was not notice of the defendants' equities, but only evidence tending to prove notice." Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167, is also to the same point, and the opinion in that case is very full and instructive. (See also Thompson v. Pioche, 44 Cal. 516.) The above cases state the true rule, and a close examination of the other California cases will disclose nothing in conflict therewith, although there is a dictum to the contrary in Talbert v. Singleton, 42 Cal. 395.

5. Davis v. Ward, 109 Cal. 186, 41 P. 1010 (1895):

- ***The authorities leave somewhat doubtful the point whether one setting up the defense of subsequent purchase in good faith without notice must show that he had no notice*** (Pearce v. Foreman, 29 Ark. 568); but the general rule clearly is that he must affirmatively show a purchase for value and that the purchase money had been paid before notice. There might perhaps be peculiar circumstances -- such as investments for improvement of the property, etc., so that a purchaser could not be put in statu quo -- which would take a purchase made wholly or partly upon credit out of the rule, but the general rule is as above stated. (Eversdon v. Mayhew, 65 Cal. 167; Scott v. Umbarger, 41 Cal. 419; Combination Land Co. v. Morgan, 95 Cal. 552; Isenhoot v. Chamberlain, 59 Cal. 639; Boone v. Chiles, 10 Pet. 210; Wells v. Morrow, 38 Ala. 128; Jewett v. Palmer, 7 Johns. Ch. 68; 11 Am. Dec. 401.) In Eversdon v. Mayhew, supra, ***this court speaking of one claiming protection as bona fide purchaser declares that he must aver and prove "the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment***, for if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser."

6. Schumacher v. Truman, 134 Cal. 430, 66 P. 591 (1901):

- The rule that one who purchases land, which is not at the time in the possession of his vendor, takes the same in subordination to the rights of another who is in its actual possession, ***is subject to the qualification that such actual possession must not only be open and notorious, but also that it be exclusive, and inconsistent with the record title***. (Smith v. Yule, 31 Cal. 180; Staples v. Fenton, 5 Hun, 172; Pope v. Allen, 90 N. Y. 298; Holland v. Brown, 140 N. Y. 344; Rankin v. Coar, 46 N. J. Eq. 566; Ellison v. Torpin, 44 W. Va. 414; Munn v. Achey, 110 Ala. 628; Lance v. Gorman, 136 Pa. St. 200) Such possession is not, of itself, notice, but merely evidence tending to prove notice sufficient to put the purchaser on inquiry (Emeric v. Alvarado, 90 Cal. 471); and "inquiry does not become a duty when the apparent possession is consistent with the title appearing of record." (Smith v. Yule, 31 Cal. 180.) "What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell." (Meehan v. Williams, 48 Pa. St. 238.) "***The rule is universal, that if the possession be consistent with the recorded title, it is no notice of an unrecorded title***." (Kirby v. Tallmadge, 160 U.S. 379.) If the actual possession is consistent with the record title, it will be presumed to be under that title and referable thereto. (Plumer v. Robertson, 6 Serg. & R. 179; Dutton v. McReynolds, 31 Minn. 66; Harding v. Seeley, 148 Pa. St. 20.)

- Under these principles, it must be held that the possession of the land by a tenant of the plaintiff did not give any notice to Truman of the plaintiff's claim derived under the unrecorded agreement between him and his wife. By the terms of the judgment in the divorce suit, the plaintiff and his wife became tenants in common of the land, and upon the recording of that judgment, notice was given to the world of the character and extent of their respective interests therein. There was thereafter no change in the character of the plaintiff's possession, nor did he in any manner indicate that his possession was hostile to the claim of his co-tenant. The possession by his tenant was no greater notice of his claim of title than would have existed if he himself had been in the actual occupation of the land. By virtue of being a co-tenant with his former wife, he was entitled, as against every one except her, to the possession of the whole of the land. But such possession was at the same time the possession of his co-tenant, and is presumed to have been in her interest and for her benefit, as well as for himself. (Freeman on Cotenancy, sec. 167; Unger v. Mooney, 63 Cal. 586; Wilcox v. Loominster National Bank, 43 Minn. 541.) As he was therefore entitled to the possession of the whole of the land, his possession was consistent with the record title, and Truman had the right to assume that such possession was in accordance with that title, and was not required to inquire of him whether he had some unrecorded claim in addition thereto. (McNeil v. Polk, 57 Cal. 323.)

*7. **Kenniff v. Caulfield***, 140 Cal. 34, 73 P. 803 (1903):

- In order to defeat the claim of plaintiff under the prior deed, it was ***incumbent upon the defendant to prove, that he was a bona fide purchaser of the premises in dispute***; that he had paid a valuable consideration therefor, and without notice of plaintiff's claim. The burden in that respect was upon him. ***To entitle a party to protection as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment, for, if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser***. (Eversdon v. Mayhew, 65 Cal. 167; Davis v. Ward, 109 Cal. 190; County Bank of San Luis Obispo v. Fox, 119 Cal. 64.)

*8. **Taber v. Beske***, 182 Cal. 214, 187 P. 746 (1920):

- The finding that Mary Beske was in actual, open, exclusive, and adverse possession of the lot, by herself and her tenants, at the time Taber bought and paid for the lot, put him on inquiry as to her rights and claims upon the property and charged him with knowledge of all that such inquiry, if pursued, might have developed. (Bryan v. Ramirez, 8 Cal. 467, [68 Am. Dec. 340]; Dreyfus v. Hirt, 82 Cal. 625, [23 Pac. 193]; Fair v. Stevenot, 29 Cal. 489; Stonesifer v. Kilburn, 122 Cal. 664, [55 Pac. 587]; Woodson v. McCune, 17 Cal. 304;***Scheerer v. Cuddy***, 85 Cal. 270, [24 Pac. 713]; Beattie v. Crewdson, 124 Cal. 579, [57 Pac. 463].) ***His actual knowledge is, therefore, not necessary to support the judgment***.

*9. **Bessho v. General Petroleum Corp.***, 186 Cal. 133, 199 P. 22 (1921):

- In ***Scheerer v. Cuddy***, 85 Cal. 270, [24 Pac. 713], the property was an office building. The owner leased some of the rooms to a lodge. These rooms were kept locked. The purchaser assumed the lodge-rooms were vacant. The court, in holding that the purchaser was to be charged with notice of the lessee's possession, said: "***It was his duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact must be regarded as the strongest evidence of bad faith on his part***. The burden of making the proper inquiry was cast upon him by the mere fact of

actual possession on the part of the appellant. If it were allowed that by failure to acquaint himself with the fact of possession on the part of another than the vendor, the vendee could avoid the effect of the rule above stated, ***he could purposely avoid any inquiry on the subject, and thereby evade the rule and its consequences entirely***."

10. Follette v. Pacific Light & Power Corp., 189 Cal. 193, 208 P. 295 (1922):

- [T]he actual possession and occupancy of the property imparts notice of the right of the possessor and occupant to those who undertake to deal with the property or the title thereto while such actual possession and occupancy exists. That under that rule a subsequent purchaser, even though he had paid full value for the property, could not be a purchaser in good faith under such circumstances, is borne out by the uniform course of decisions in this state from the very beginning of our judicial history. (Stafford v. Lick, 7 Cal. 479; Partridge v. McKinney et al., 10 Cal. 181; Morrison v. Wilson, 13 Cal. 494 [73 Am. Dec. 593]; Lestrade v. Barth, 19 Cal. 660; Landers v. Bolton, 26 Cal. 393; Killey v. Wilson, 33 Cal. 690; ***Pell v. McElroy*** et al., 36 Cal. 268; Jones v. Marks, 47 Cal. 242; Pacific Mutual etc. Co. v. Stroup, 63 Cal. 150; Dreyfus v. Hirt, 82 Cal. 621 [23 Pac. 193]; ***Scheerer v. Cuddy***, 85 Cal. 270 [24 Pac. 713]; ***Hyde v. Mangan***, 88 Cal. 319 [26 Pac. 180]; Security Loan etc. Co. v. Willamette etc. Co. et al., 99 Cal. 636 [34 Pac. 321]; Bessho v. General Petroleum Co., 186 Cal. 133 [199 Pac. 22].)

- This concept of the importance of possession as notice of the rights and interests of the possessor has been firmly engrafted upon our American system of jurisprudence. In Washburn on Real Property, volume 3, page 292 (sixth edition), it is stated that "the courts in many states hold that open, notorious, exclusive, unequivocal and visible possession by a grantee in a deed is to be deemed notice of its having been made." The courts of California are in the list of those cited by the learned author in support of this doctrine. It was held in a very early period in our judicial history that "***The fact of open, notorious, and exclusive possession and occupation of lands by a stranger to a vendor's title, as of record at the time of a purchase from and conveyance by such a vendor out of possession, is sufficient to put such purchaser upon inquiry as to the legal and equitable rights of the party so in possession, and such vendee is presumed to have purchased and taken a conveyance from the vendor with full notice of all the legal and equitable rights in the premises of such party in possession and in subordination to these rights***." (***Pell v. McElroy***, supra.) And this court in the same case further held that "he cannot be regarded a purchaser in good faith who ***negligently or willfully closes his eyes***to visible pertinent facts, indicating adverse interest in or encumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case."

- In the case of ***Scheerer v. Cuddy, supra***, this court said: "***Whether the respondent knew of the appellant's possession, or not, is immaterial. It was his duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact must be regarded as the strongest evidence of bad faith on his part***. The burden of making the proper inquiry was cast upon him by the mere fact of actual possession on the part of the appellant. If it were allowed that by failing to acquaint himself with the fact of possession on the part of another than the vendor the vendee could avoid the effect of the rule above stated, ***he could purposely avoid any inquiry on the subject, and thereby evade the rule and its consequences entirely***."

- In the recent case of Bessho v. General Petroleum Co., supra, the foregoing language from the case last above cited was quoted and approved. It must, therefore, be taken to be the long and well-settled law of

this state that the actual, open, notorious and visible possession and occupancy of real property imparts notice to those dealing with the title thereto of the rights and interests of such possessor and that a person attempting to obtain title to such premises with such knowledge, or duty to acquire such knowledge, as such notice imparts, cannot as to such possessor be or become a bona fide purchaser thereof to the extent of being able to assert a better right or title thereto than that which his predecessors had or could have asserted.

11. Gibbons v. Yosemite Lumber Co., 190 Cal. 168, 211 P. 4 (1922):

- [A] possessor of land using the same for pasturage could neither be expected nor required to continuously keep his stock upon his land after its feed was gone in order to avail himself of his rights of possession dependent upon his use of the premises for pasturage. (Coryell v. Cain, 16 Cal. 573; Webber v. Clarke, 74 Cal. 11 [15 Pac. 431]; Brumagin v. Bradshaw, 39 Cal. 24.)

- In the case last cited the court says (p. 46): "The general principle which underlies all this class of cases is, that the acts of dominion must be adapted to the particular land, its condition, locality and appropriate use." The controlling factors in the instant case are: that the plaintiff was actually residing upon the land and was actually using it for the purposes to which it was adapted, viz.: that of pasturage, and that he was maintaining his exclusive possession thereof by keeping the stock of all others off the land. We are of the opinion that these facts as shown in the evidence sufficiently prove such actual and exclusive occupancy of the entire tract of forty acres of the land as to amount to possessio pedis, and, as such, sufficient to impart notice to the purchaser of the plaintiff's rights and equities therein.

12. ***J. R. Garrett Co. v. States***, 3 Cal.2d 379 [44 P.2d 538] (1935):

- As a general rule, possession of real property is constructive notice to any intending purchaser or encumbrancer of said property. ***This rule is so well established that citation of authority is hardly necessary***.

- We mention, however, the case of Follette v. Pacific L. & P. Co., 189 Cal. 193, 205 [208 P. 295, 23 A.L.R. 965], where a long list of authorities is cited. ***This rule applied even in the case of a grantor remaining in possession after execution and delivery of a deed to his vendee***. (***Pell v. McElroy***, 36 Cal. 268, 272, 274; O'Rourke v. O'Connor, 39 Cal. 442; Taber v. Beske, 182 Cal. 214, 216 [187 P. 746]; Hopkins v. Garrard, 7 B. Mon. (Ky.) 312.)

- In ***Pell v. McElroy***, supra, the question presented in the instant case was before the court, as appears from the following quotation from the opinion in that case: "In the present case the question arises, whether the fact of open, notorious, and exclusive possession of lands by a vendor thereof, after transfer of his legal title thereto by deed, is sufficient to put a subsequent vendee of the same premises, while so in possession of the original vendor, upon inquiry as to the equitable rights of such original vendor, and subject such subsequent purchaser to the same rules as when a stranger to the title of his vendor, as of record, is in possession."

- Continuing, the court, on page 274 [36 Cal.], says: "An absolute deed divests the grantor not only of his legal title, but right of possession; and when such grantor is found in the exclusive possession of the granted premises long after the delivery of his deed, here is a fact antagonistic to the fact and legal effect of the deed; and we cannot appreciate the justice, sound reason, or policy of a rule which would authorize a subsequent purchaser, while such fact of possession continues, to give controlling

prominence to the fact and legal effect of the deed, in utter disregard of the other notorious prominent antagonistic fact of exclusive possession in the original grantor. He cannot be regarded a purchaser in good faith who negligently or willfully closes his eyes to visible pertinent facts, indicating adverse interest in or incumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case."

- In the concluding paragraph of the opinion the court reiterates the rule as follows: "***The continued exclusive possession of a vendor after his formal conveyance of the legal title is a fact in conflict with the legal effect of his deed, and is presumptive evidence that he still retains an interest in the premises, and is sufficient to put a purchaser upon inquiry, and subject him to the general rule heretofore announced in case of the party in possession being a stranger to the title as of record***." The case of ***Pell v. McElroy***, supra, is cited with approval in many cases decided by this court.

- The same principle is expressly approved in Taber v. Beske, supra. In that case Mrs. Beske, an ignorant woman, desired to borrow the sum of $500 upon a lot owned by her. She so informed one Horsford, who fraudulently prepared a power of attorney in his favor, and represented to her it was a mortgage on her lot to secure the payment of $500. She, relying upon his statement and without reading the power of attorney, signed it, and Horsford gave her the sum of $500. After a short visit to her old home in Europe she returned to her home here, and ever since that time had been in possession and occupancy of said lot, either in person or through her tenants. Horsford, acting under his power of attorney, conveyed the lot to one Dennison, who paid no consideration and who knew that the conveyance was unauthorized. Thereafter, and while defendant Beske was in the possession of said lot, Horsford and Dennison conveyed the lot to plaintiff for a valuable consideration. The trial court found that plaintiff acquired title to said real property with notice of the defendant's rights therein and rendered judgment in favor of the defendant. In affirming the judgment this court said (p. 217 [182 Cal.]): "Appellant contends that there is no evidence to support the finding that Taber, at the time he purchased and received the deed, was informed of the power of attorney and the circumstances of its execution. The finding that Mary Beske was in actual open, exclusive, and adverse possession of the lot, by herself and her tenants, at the time Taber bought and paid for the lot, put him on inquiry as to her rights and claims upon the property and charged him with knowledge of all that such inquiry, if pursued, might have developed."

- In Hopkins v. Garrard, supra, the opinion delivered by Chief Justice Marshall states the law upon this question as follows: "But the fact that, notwithstanding his deed to Hopkins, which acknowledged full payment, Garrard, the grantor, remained in possession of the land, was an indication that he had or claimed some interest in the land, and should have put the subsequent vendees on an inquiry, by which they would have easily learned that the purchase money was, in fact, unpaid, and probably that Garrard was holding the possession as security for it. On the ground of notice, therefore, implied from the possession, the lien of Garrard for his purchase money is considered effectual against the subsequent purchase, even beyond the effect of the lis pendens."

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13. Campbell v. Grennan, 13 Cal. App. 481; 110 P. 156 (Cal. App. 3d Dist. 1910):

- It is conceded that defendants were also in possession of the disputed strip, but the rule is invoked that requires open, notorious and exclusive possession to impute to the purchaser of the record title notice of undisclosed equities in favor of another person. The authorities seem to be uniform as to this legal proposition. It is stated in Smith v. Yule, 31 Cal. 185, [89 Am. Dec. 167], as follows: "***Where the vendor is in the apparent possession, the subsequent purchaser, finding the title of record in the vendor, is put upon no further inquiry, because the possession appears to be according to the title; and if at the same time another person is also in possession, there is no presumption of title in him inconsistent with that found in the vendor***. . . . The subsequent purchaser is not justly chargeable with fraud in failing to make inquiry for a prior unrecorded conveyance, unless there is some fact or circumstance apparent to his observation, calculated to excite the suspicion of a prudent man dealing with the property, that a prior conveyance has been made. ***The existence of such a conveyance would not be suggested by the possession of a third person, while the vendor held the title appearing of record and was in the apparent possession***." Other cases are cited to the same effect.

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- In the Smith case, supra, the vital fact is disclosed in the statement given in the syllabus: "If the owner of a lot in a city occupies part of a house on the same, and another person occupies the remainder of the house, and while this occupation of both continues the owner conveys to this other person whose deed is not recorded, and then conveys to a third person whose deed is first recorded, the possession of the one having the unrecorded deed is not sufficient to give notice to the subsequent purchaser," and this, for the reason that the possession appears to be according to the title.

- In Taylor v. Central Pac. R. R. Co., 67 Cal. 615, [8 Pac. 436], it was held upon conflicting evidence that the claimant had not settled upon nor improved the land in controversy, and it appeared that the subsequent applicant had no knowledge that any portion of the land had been inclosed by plaintiffs or that they had made any application for the purchase thereof, the contest involving the question as to whether plaintiffs or the defendant Davis should be preferred as the purchaser of certain land belonging to said company.

- In Schumacher v. Truman, 134 Cal. 430, [66 Pac. 591], it was held that "***the possession of a tenant of the divorced husband after the decree of divorce must be presumed to be the possession of the divorced wife***, as a tenant in common with him, and is consistent with and not adverse to the record title of the divorced wife, and ***did not put the purchaser from her upon inquiry as to any equitable rights of***

the divorced husband under the unrecorded agreement." This, of course, must follow from the principle that either of the cotenants was entitled to the possession of the whole of the land as against everyone except his cotenant and that the possession of one cotenant is presumed to be for his benefit and also for that of his cotenant. His possession or that of his tenant would therefore be no notice of any hostility to the title of his cotenant.

- In Harris v. McIntyre et al., 118 Ill. 275, [8 N. E. 182], it appears that the owner of the legal title was permitted "to exercise, so far as the public could see, exclusive control and management of the farm and its products," without objection by the claimant of the equitable title, or the assertion of any right on her behalf, "while she to all appearances was simply the housekeeper for her brother, and as far as shown by the proof, apparently, to the world, occupied the premises in no other capacity."

- In the case of Lindley v. Martindale, 78 Iowa, 379, [43 N. W. 233], the title to the lands was in a son of the plaintiff, who resided on a portion of them, while plaintiff and her husband resided on another portion, but the lands had for a long time been cared for by both the husband and the son. It was justly held that one who, upon being told that the title was all right in the son, took a mortgage from the son to secure a loan which was used for the most part to pay off prior encumbrances placed on the land by the son, was not charged with the alleged equities of plaintiff by reason of her claimed possession of the land. Since the son exercised acts of ownership jointly with his father, it negatived any inference that might arise from the existence of separate residences. Besides, it was decided that the plaintiff was estopped by her conduct from setting up the claim of any equitable interest in the premises.

- In Atwood v. Bearss, 47 Mich. 72, [10 N. W. 112], it was held that ***the fact that the husband lived on the premises with his wife did not constitute notice of an unrecorded deed from her to him***.

- Wells v. Am. Mort. Co., 109 Ala. 430, [20 South. 136], is to the same effect, where it is declared that "***The possession of land by the grantee, holding under an unrecorded deed together with her grantor, is not constructive notice of the unrecorded deed to a subsequent purchaser***."

- In Pope v. Allen, 90 N.Y. 298, it also appeared that both defendant and P. lived upon the land at the time of the conveyance to plaintiff and apparently occupied it jointly. Plaintiff had no actual notice of defendant's rights. "Held, that as P. had the record title the proper inference was that defendant's possession was under him and in subordination to his title."

- McCarthy v. Nicrosi, 72 Ala. 332, [47 Am. Rep. 418], and Townsend v. Little, 109 U.S. 504, [3 Sup. Ct. Rep. 357], likewise ***present the situation of a joint occupancy***.

14. Olson v. Cornwell, 134 Cal. App. 419; 25 P.2d 879 (Cal. App. 1st Dist. Div.1 1933):

- Where a plaintiff asserts title under a prior unrecorded deed, and the defendant claims under a recorded deed, ***the burden is upon the latter to prove that he is a purchaser in good faith for a valuable consideration and without notice***, actual or constructive, prior and down to the time of payment (Kenniff v. Caulfield, 140 Cal. 34 [73 P. 803]; Bell v. Pleasant, 145 Cal. 410 [78 P. 957, 104 Am. St. Rep. 61]). ***A mortgage comes within the same rule, and the law protects or defeats both alike*** (18 Cal. Jur., Mortgages, sec. 421, p. 114; Prouty v. Devin, 118 Cal. 258 [50 P. 380]).

15. Basch v. Tidewater Associated Oil Co., 49 Cal. App. 2d Supp. 743; 121 P.2d 545 (App. Div. Super. Ct. San Francisco, 1942):

- The law has long been settled in this state that possession of land by one other than the vendor is notice, or at least evidence of notice, to an intending purchaser sufficient to put him on inquiry as to the right, title or interest of the occupant unless, ***under the peculiar circumstances of the case, there is no duty to make inquiry***.

- The authorities also hold that such notice resulting from possession ***is the same in effect as the notice imputed by the recording acts***. (66 C. J., pp. 1165, 1166.) Records are but constructive notice of a title of which they enable a party to obtain actual notice or knowledge by means of search or inquiry. (Garber v. Gianella, 98 Cal. 527, 529 [33 P. 458].)

- It is also settled that if the circumstances as to possession are such as to put a purchaser on inquiry he is chargeable with knowledge of all that a reasonably diligent inquiry as to the rights and claims of the occupant might have disclosed. (25 Cal. Jur., pp. 834-836.) The same doctrine must on principle be applicable when the prospective purchaser knows of an outstanding lease on the property although the lessee is not in possession of the property.

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- It is true that there are a few cases to the contrary such as the Texas case cited by respondents. But as was said in the well considered Nebraska case of Dengler v. Fowler, 94 Neb. 621 [143 N.W. 944], the minority doctrine is based on the "isolated" Texas case of Hamilton v. Ingram, 13 Tex. Civ. App. 604 [35 S.W. 748]. As the Nebraska court said [94 Neb. 621 (143 N.W. 944)]:

- "The decisions generally, however, announce a contrary doctrine. ***The possession of a tenant is not only notice to the world of his rights as lessee, but is notice of all other interests of which inquiry would elicit knowledge***. A purchaser of land, in possession of a lessee who was not asked about his interests in the demised premises, is bound by all of the equities enforceable by the lessee against the vendor." Although in the instant case the lessee was not in possession of the property the lessor's knowledge of the lease had the same result as possession, since, as pointed out above, the two circumstances are equally effective in imposing on a prospective purchaser the duty to make inquiry.

16. ***Pacific Gas & Elec. Co. v. Minnette*** (1953) 115 Cal.App.2d 698 [252 P.2d 642]:

- '***Possession of land is notice to the world of every right that the possessor has therein***, legal or equitable; it is a fact putting all persons on inquiry as to the nature of the occupant's claims.' [Citation.] 'Except in so far as the rule has been varied by statute, actual possession of land is such notice to all the world, or to anyone having knowledge of such possession, as will put on inquiry those acquiring title or a lien on the land to ascertain the nature of the right that the occupant has in the premises. ***The presumption is that inquiry of the possessor will disclose how and under what right he holds possession, and, in the absence of such inquiry, the presumption is that, had such inquiry been made, the right, title, or interest under which the possessor held would have been discovered***.

- ***The notice which the law presumes has been held to be actual***, and not merely constructive, notice. Possession is notice not only of whatever title the occupant has but also of whatever right he may have in the property, and the knowledge chargeable to a person after he is put on inquiry by possession of land is not limited to such knowledge as would be gained by examination of the public records.' [Citations.]

17. ***Johnson v. Cella***, 122 Cal. App. 2d 72; 264 P.2d 98 (Cal. App. 3d Dist. 1953):

- In an action of this kind the subsequent grantee who claims protection as a bona fide purchaser ***is entitled to such protection unless it is established that he is chargeable with actual or constructive notice*** of the existence of the easement. (Kenniff v. Caulfield, supra; Powers v. Perry, 12 Cal.App. 77 [106 P. 595].) "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." (***Civ. Code, § 19***.) ***He is bound to take notice of facts which a reasonable inspection of the land would disclose to him and to make further inquiry when something is visible that would suggest such a course to a prudent person, possessing ordinary faculties***. (Pollard v. Rebman, 162 Cal. 633 [124 P. 235]; Rubio Canon etc. Assn. v. Everett, supra; Powers v. Perry, supra.)

18. ***Asisten v. Underwood*** (1960) 183 Cal.App.2d 304 [7 Cal.Rptr. 84]:

- It is a general rule that possession of real property is constructive notice to any intending purchaser or encumbrancer of the property of all the rights and claims of the person in possession which would be disclosed by inquiry. (***Pell v. McElroy***, 36 Cal. 268, 272.)
- ***This rule is extended to the case of a grantor remaining in possession after execution and delivery of a deed to his vendee*** and a subsequent purchaser of the same property must inquire into the equitable rights of the original vendor. (***Pell v. McElroy***, supra; J. R. Garrett Co. v. States, ***3 Cal.2d 379*** [44 P.2d 538].)
- The same rule was applied in Taber v. Beske, 182 Cal. 214, 217 [187 P. 746], where the court said: "Appellant contends that there is no evidence to support the finding that Taber, at the time he purchased and received the deed, was informed of the power of attorney and the circumstances of its execution. The finding that Mary Beske was in actual, open, exclusive, and adverse possession of the lot, by herself and her tenants, at the time Taber bought and paid for the lot, put him on inquiry as to her rights and claims upon the property and charged him with knowledge of all that such inquiry, if pursued, might have developed. (Citations.) His actual knowledge is, therefore, not necessary to support the judgment."

19. ***Saxon v. Du Bois***, 209 Cal. App. 2d 713; 26 Cal. Rptr. 196 (Cal. App. 1st Dist. Div.3, 1962):

- ***Whether defendant knew of the possession by Daut of the pipe and catch basin is immaterial. It was her duty to know before making the purchase, else the purchaser could purposely avoid any inquiry on the subject and thereby defeat the rule of notice by possession***. (Follette v. Pacific Light & Power Corp., 189 Cal. 193, 213 [208 P. 295, 23 A.L.R. 965]; Scheerer v. Cuddy, 85 Cal. 270, 273 [24 P. 713]; Wineberg v. Moore, 194 F.Supp. 12, 16, 17; Beverly Hills Nat. Bank v. Seres, ***76 Cal.App.2d 255***, 263 [172 P.2d 894].)

20. ***Evans v. Faught***, 231 Cal. App. 2d 698; 42 Cal. Rptr. 133 (Cal. App. 1st Dist. Div 1, 1965):

- Such finding and conclusion were, moreover, in accordance with the cases which, in construing section 1214, ***fn. 8*** have held that an unrecorded lease is not void as against a purchaser who has notice of the lease or such notice as should put him on such inquiry as would disclose its existence. (Scheerer v. Cuddy, ***85 Cal. 270***, 272 [24 P. 713]; Commercial Bank v. Pritchard, 126 Cal. 600 [59 P. 130].)

- The rationale of this rule is that a purchaser of premises occupied in part by a third person under an unrecorded lease cannot be said to be an innocent purchaser since possession by such third party may constitute notice to the purchaser, provided it is open, notorious, exclusive and visible, and not consistent with the record title. (***Scheerer v. Cuddy***, supra, pp. 272-273; Manig v. Bachman, ***127 Cal.App.2d 216***, 221-222 [273 P.2d 596]; High Fidelity Enterprises, Inc. v. Hull, ***210 Cal.App.2d 279***, 281 [26 Cal.Rptr. 654].)

21. ***Hansen v. G & G Trucking Co.***, 236 Cal. App. 2d 481; 46 Cal. Rptr. 186 (Cal. Ap.. 1st Dist, Div.1, 1965):

- Insofar as the possession of the property by respondent's mother is concerned, it is well settled that "the possession of the tenant is notice of his landlord's title; that is to say, such possession is sufficient to put a person dealing with the property upon inquiry; and the law will charge him with notice of all those facts which he might have ascertained, had he pursued the inquiry with proper diligence." (O'Rourke v. O'Connor, 39 Cal. 442, 446-447; White v. Rosenstein, [236 Cal.App.2d 499] ***8 Cal.App.2d 217***, 223 [47 P.2d 358]; Manig v. Bachman, supra, pp. 221- 222.)

- Accordingly, "It is equally well settled that where a person who is a stranger to the record title of the vendor is in possession, the purchaser is under a duty to make inquiry of such stranger's rights, and failure to do so deprives him of the status of bona fide purchaser." (***Manig v. Bachman***, supra, p. 222; Hunter v. Watson, 12 Cal. 363 [73 Am.Dec. 543]; ***Pell v. McElroy***, 36 Cal. 268.)

22. ***Caito v. United California Bank***, 20 Cal. 3d 694, 576 P.2d 466; 144 Cal. Rptr. 751 (1978):

- Joint ownership is not in itself a circumstance sufficient to impose a duty on an encumbrancer to inquire whether there are unrecorded agreements between joint owners. (Kirby Lumber Co. v. Temple Lumber Co. (1935) 125 Tex. 294 [83 S.W.2d 638, 643].) Policy runs against upholding secret liens and charges to the injury of subsequent innocent encumbrancers. (Schut v. Doyle (1959) ***168 Cal.App.2d 698***, 702 [336 P.2d 567].) Inquiry does not become a duty when apparent possession is consistent with title appearing of record. (Smith v. Yule (1866) 31 Cal. 180, 184; Three Sixty Five Club v. Shostak (1951)***104 Cal.App.2d 735***, 738 [232 P.2d 546]; Pacific Fruit Exchange v. Schropfer (1929) 99 Cal.App. 692, 694 [279 P. 170].)

23. ***Claremont Terrace Homeowners' Ass'n v. United States***, 146 Cal. App. 3d 398; 194 Cal. Rptr. 216 (Cal. App. 1st Dist. Div.1, 1983):

- As explained in Asisten v. Underwood (1960) ***183 Cal.App.2d 304***, 309 [7 Cal.Rptr. 84]: "It is a general rule that possession of real property is constructive notice to any intending purchaser or encumbrancer of the property of all the rights and claims of the person in possession which would be disclosed by inquiry."

- "The possession required to impart notice to a subsequent purchaser must be open, notorious, exclusive and visible, and not consistent with the record title." (High Fidelity Enterprises, Inc. v. Hull, supra, ***210***

Cal.App.2d 279, 281.) ***If either a tenant or a stranger is in possession of leased premises, the purchaser is charged with all those facts which might have been ascertained had a reasonably diligent inquiry been made***. (Manig v. Bachman, supra, *127 Cal.App.2d 216*, 221-222; Natural Resources, Inc. v. Wineberg, supra, 349 F.2d 685, 690.)

- And as noted in Pacific Gas & Elec. Co. v. Minnette (1953) *115 Cal.App.2d 698*, 705 [252 P.2d 642]: "'Possession is notice not only of whatever title the occupant has but also of whatever right he may have in the property, and the knowledge chargeable to a person after he is put on inquiry by possession of land is not limited to such knowledge as would be gained by examination of the public records." (Italics omitted.) *fn. 6* The subsequent purchaser or encumberer has the burden of showing lack of notice. (Chalmers v. Raras (1962) *200 Cal.App.2d 682*, 686 [19 Cal.Rptr. 531]; Manig v. Bachman, supra, *127 Cal.App.2d at p. 223*.)

24. Mullin v. Bank of America, 199 Cal. App. 3d 448; 245 Cal. Rptr. 66 (Cal. App. 1st Dist. Div 3, unpub. 1988):

- We also note that '[e]very person who has actual notice of circumstances sufficient to put a prudent [person] upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he [or she] might have learned such fact.' (*Civ. Code, § 19*.) The general rule is that possession of real property by one other than the seller is notice sufficient to put an intending purchaser or encumbrancer of property on inquiry as to the rights of the occupant unless under the peculiar circumstances of the case there is no duty to make inquiry. (*Three Sixty Five Club v. Shostak* (1951) 104 Cal.App.2d 735, 738 [232 P.2d 546]; *Asisten v. Underwood* (1960) 183 Cal.App.2d 304, 309 [7 Cal.Rptr. 84].)

25. *In re Marriage of Cloney*, 91 Cal. App. 4th 429; 110 Cal. Rptr. 2d 615; (2001):

- By statute, notice may be actual or constructive. Actual notice is defined as "express information of a fact," while constructive notice is that "which is imputed by law." (*Civ. Code, § 18*.) (2) "A person generally has 'notice' of a particular fact if that person has knowledge of circumstances which, upon reasonable inquiry, would lead to that particular fact." (First Fidelity Thrift & Loan Assn. v. Alliance Bank (1998) 60 Cal. App. 4th 1433, 1443 [71 Cal. Rptr. 2d 295]; *Civ. Code, § 19*; 5 Miller & Starr, Cal. Real Estate (3d ed. 2000) Recording and Priorities, §§ 11:49 to 11:51, 11:58 to 11:59, pp. 129-138, 147-151.)

Asher's Money Closing Speech to Judge

Your honor, the Plaintiff does not have a legal right to file this UD.

The Plaintiff is well aware that my client has a valid claim.

The Plaintiff purchased the property despite my client's claim and thus by definition is not a bona fide purchaser.

Without having bona fide purchaser status, the Plaintiff has not obtained a duly perfected security interest in the property and by CCP xyz he must have a duly perfected security in order to succeed in a UD action.

With that being said your honor, I think that it would be appropriate for the court to issue summary judgment in favor of my client.

If your honor would agree, I think that the most efficient use of the court's limited resources would be to combine the UD action with my client's claim and adjudicate them at the same time for a quick resolution to this problem.

Sincerely,

A.P. Robertson

A. P. Robertson