CAMERON *v.* WESTBROOK.

Opinion delivered December 10, 1928.

1. TENANTS IN COMMON—ADVERSE POSSESSION.—In order for the possession of a tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts of unequivocal character that notice may be presumed; the reason being that the possession of one tenant in common is the possession of all the cotenants.
2. TENANTS IN COMMON—ADVERSE POSSESSION.—Since a remainderman has no right to recover the land during the life of the life tenant, title cannot be acquired against the remainderman by adverse possession during the life of the life tenant.

Appeal from Jefferson Chancery Court; *H. R. Lucas,* Chancellor; reversed.

STATEMENT OF FACTS.

This appeal is prosecuted from a decree canceling certain deeds to appellant as a cloud upon her title to a particular strip of land and quieting her title to a part of lot 7, joining lot 6 of Tannehill & Owens' subdivision of a certain 40-acre tract of land, an addition to the city of Pine Bluff, Arkansas, the chancellor having found appellee had acquired title thereto by adverse possession.

It appears from the testimony that W. H. Westbrook had purchased two certain small tracts of land and erected his home on one of them, and allowed his son, the husband of Helen F. Westbrook, to live upon the land adjoining the place of his home; that these two tracts of land were afterwards platted as Tannehill & Owens' subdivision, an addition to the city of Pine Bluff, the land upon which the home of W. H. Westbrook was

situated being designated on the plat as lot 7 and the lot upon which appellee lived with her husband being designated as lot 6, both lots being then and thereafter owned by said W. H. Westbrook at the time of his death. Westbrook devised his homestead to his wife, Cora N. Westbrook, for life, designating it "my homestead at 712 West 6th Avenue, in the city of Pine Bluff, Arkansas." Howell L. Westbrook, husband of appellee, brought suit against the other heirs for partition of certain lands of the estate, alleging therein that the homestead mentioned in the will of W. H. Westbrook, his father, comprised lot 7, and asked only that lot 6 and other property of the estate, except lot 7, be partitioned and sold. It was partitioned and sold, and H. L. Westbrook became the purchaser of said lot 6. A few months thereafter he conveyed it by trust deed as lot 6, particularly describing it as beginning at the northeast corner of lot 6, the description showing the lot only 104 8/10 feet wide from east to west, which did not include the strip of land in controversy. On the 24th day of December, 1923, more than seven years after he acquired the commissioner's deed, he conveyed the whole of lot 7 to appellee herein, Helen F. Westbrook. He then made an additional deed on the same day, which was never recorded, conveying the strip of land in controversy to Helen F. Westbrook. The fence dividing the yards or lots between the houses where W. H. Westbrook lived and his son W. L. Westbrook, was erected while the property all belonged to the ancestor, W. H. Westbrook. There was no change of possession of the lots by Howell L. Westbrook after he purchased at the commissioner's sale in making the partition on his petition therefor, nor was anything else done by him or his grantees, so far as disclosed by the record, to bring home to the other cotenants notice that he claimed adversely to them the strip of land in controversy, which is in fact a part of lot 7, although it was inclosed inside the fence of the premises where Howell L. Westbrook lived on lot 6, adjoining his father's homestead.

Jones & Hooker and *R. S. Cameron,* for appellant.

Bruce H. Shaw and *J. M. Shaw,* for appellee.

KIRBY, J., (after stating the facts). The chancellor held that appellee and her grantors had held possession of the strip of land in controversy for more than seven years, "with a mistaken idea that it constituted lot 6 in said addition," and acquired title by adverse possession.

Appellee's grantor, her husband, lived on premises belonging to his father, the common source of title, at the time of his father's death, and was a tenant in common of the undisposed-of lands of the estate. He recognized in his petition for partition of the lands that the homestead devised to the widow, etc., was situated on lot 7 of the addition, and only prayed the sale of lot 6 adjoining the homestead in the partition, and purchased same as lot 6 at the commissioner's sale. He later mortgaged it as such lot 6, and particularly described it as 104 8/10 feet wide, which did not include any of the strip of land in controversy, which was in fact a part of lot 7 as platted, and so recognized by him in his suit for partition. There was no act or thing done by him in the way of a change of possession after his purchase of the lot at the partition sale, nor was there any act shown to have been done that should charge the other owners of lot 7 with notice of any adverse claim of possession by him or his grantees. The chancellor in fact found that appellee held possession of the strip of land in controversy under the "mistaken idea" that it constituted a part of lot 6.

There is no testimony in this record showing when any knowledge of appellee's adverse claim or of her intention or that any of her grantors to so hold was brought home to the other tenants, and, under such circumstances, the holding could not be adverse to them. *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958. It was there said:

"In order for the possession of the tenant in common to be adverse to that of his cotenants, knowledge

of his adverse claim must be brought home to them directly, or by such notorious acts of an unequivocal character that notice may be presumed; the reason being that the possession of one tenant in common is the possession of all the tenants in common."

Appellee argues that at no time did she or Howell L. Westbrook, her grantor, acknowledge the right or title of appellants or those under whom they hold, and says that, in the suit for partition of all real estate of W. H. Westbrook, deceased, in which Howell L. Westbrook was plaintiff and Cora N. Troxel and Franklin Westbrook were defendants, they were then put on notice that it was to be a final disposition of all the estate; that they then had opportunity to set up any claim they might have had to the strip of land in controversy, the east 6 feet and 2 inches of lot 7, and, having failed to do so, acquiesced in the disposition made of it. It must be remembered, however, that it was alleged in that suit that the homestead, consisting of lot 7, was given by the will to the widow for life, and to Howell L. Westbrook, plaintiff, and Franklin Westbrook, one of the defendants, in remainder, and not subject to partition or sale, and it was so adjudged that the said parties were tenants in common in the remainder.

The undisputed testimony shows no act of possession or claim of ownership of part of said lot 6 by occupancy of lot 6 after the purchase by Howell at the partition sale different from his holding as tenant of his father, nor any act on his part calculated to bring home to his cotenants knowledge of his adverse claim to any part of said lot 7, and the chancellor erred in holding otherwise.

The chancellor likewise erred in holding appellee acquired title by adverse possession against the remainderman, and canceling his conveyance of the property in any event, before the death of the life tenant, his mother, Cora N. Troxel, with whom he joined in the deed conveying his remainder. He had no right of action to protect his interest in the part of the lot in controversy,

and title then could not therefore, as against him, be acquired by adverse possession of the other remainderman or his grantees. *Gallagher* v. *Johnson,* 65 Ark. 90, 44 S. W. 1041. See also *Collins* v. *Paepcke-Leicht Lumber Co.,* 74 Ark. 81, 84 S. W. 1044.

The decree will be reversed accordingly, and the cause remanded, with directions to dismiss the complaint for want of equity. It is so ordered.