TEDDIE FUSTON GREENE,	)	
	)	
Plaintiff/Appellant,	)	
	)	Warren Chancery
	)	No. 5926
VS.	)	
	)	Appeal No.
	)	01-A-01-9512-CH-00562
JEANETTE BAYER, Individually and	)	
JEANETTE BAYER, Trustee,	)	
	)	
Defendant/Appellee.	)	

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF WARREN COUNTY

AT McMINNVILLE, TENNESSEE

HONORABLE CHARLES HASTON, CHANCELLOR

KEITH S. SMARTT
107 College Street
McMinnville, Tennessee 37110
ATTORNEY FOR PLAINTIFF/APPELLANT

Thomas O. Bratcher
STANLEY & BRATCHER
100 West Main Street
P.O. Box 568
McMinnville, Tennessee 37110
ATTORNEY FOR DEFENDANT/APPELLEE

REVERSED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
BEN H. CANTRELL, JUDGE
WILLIAM C. KOCH, JR., JUDGE

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O P I N I O N

The plaintiff, Teddie Fuston Greene, has appealed from the summary dismissal of her suit against the defendant, Jeanette Bayer, individually and as trustee, seeking partition of their respective interests in certain ancestral realty.

A common ancestor of the parties was Ella Fuston, who had three children, W.C. Fuston, L.D. Fuston, Jr., and Jeanette Fuston. On December 21, 1951, Ella Fuston and her son, W.C. Fuston purchased the subject property as equal tenants in common. In 1957, W.C. Fuston died without issue, and his one-half interest in the subject property was inherited by his brother, L.D. Fuston, Jr., and his sister, Jeanette Fuston Bayer, in equal shares, that is, a one-fourth interest to each.

On December 28, 1961, L.D. Fuston, Jr., executed a deed conveying his interest in the subject property to his sister, Jeanette Fuston Bayer, who thereby became the owner of a one-half interest in the property held in common with Ella Fuston who retained the one-half interest originally purchased by her.

On May 23, 1962, Ella Fuston died intestate, leaving her one-half interest in the property to her two surviving children, that is, a one-fourth interest to L.D. Fuston, Jr., and a one-fourth interest to Jeanette Fuston Bayer.

On April 13, 1972, L.D. Fuston, Jr. died intestate. His only heir was his daughter, Teddie Fuston Greene, who brought this action for partition.

The defendant's motion for summary judgment read as follows:

> Comes now the defendant and would move for summary judgment in her favor and would show that there is no genuine issue of material fact and that the defendant is entitled to judgment in her behalf.
>
> That attached to the answer is a copy of a deed from L.D. Fuston, Jr. to Jeanette Bayer conveying all of L.D. Fuston's interest in the real estate in question to the defendant. This deed was recorded on September 15, 1962 and has been on record ever since.
>
> That the plaintiff has no interest in the real estate and, therefore, can make no claim to the real estate in question.
>
> Wherefore, the defendant moves for summary judgment in her behalf as there is no genuine issue of material fact or law in this litigation.

Apparently, the copy of the deed of L.D. Fuston, Jr. executed on December 4, 1961, before his mother's death, and recorded on September 15, 1962, after his mother's death, was the only evidence submitted in support of the motion for summary judgment.

In response to the motion for summary judgment, plaintiff filed her affidavit reading as follows:

> I, Teddie Fuston Greene, after being duly sworn do make oath or affirm the following:
>
> 1. I am competent to testify and make the following statement based upon my own personal knowledge except where the context clearly shows that a given statement is made upon information and belief.
>
> 2. I am the only child of L.D. Fuston, Jr. L.D. Fuston, Jr., W.C. Fuston and Jeanette Bayer are the only children of the late Ella Melton Fuston. W.C. Fuston died childless in 1957. L.D. Fuston, Jr., died on April 13, 1972.
>
> 3. Ella Melton Fuston died intestate on May 22, 1962. Upon information and belief, at the time of her death, Ella Melton Fuston was the owner of a one-half (½) undivided interest in the premises which are the subject of this suit as a tenant in common under a Deed from Frank Hennessee, Clerk & Master, to Ella Fuston and W.C. Fuston, dated December 14, 1951, and recorded at Warranty Deed Book 110, Page 500.

The Trial Judge delivered the following oral opinion from the bench:

> The Court: All right. I've got together with my Clerk & Master and we've gone over this thing pretty thoroughly. As I understand this, the plaintiff claims her title from her father, L.D. Fuston, Jr., gave what we call a "quit claim" deed to property in '61 to Ms. Bayer which was duly recorded. The habendum clause states, "This deed is intended to convey whatever interest that I may have in the above described tracts or parcels of land," which is where the question of law arises as I understand it.
>
> Fuston had an expectancy of inheritance as to the tract in question. Consideration was paid by his sister in the sum of $4,000.00. Equity has long recognized the right to convey an expectancy. Mr. Smartt, since both parties were *sui juris* at the time, the deed would operate as a contract to convey when the expectancy matured which would come when their surviving parent died in '62. The quit claim would be binding on the heir of Fuston as he survived his mother and died in 1972. No suit was brought until 1994, or 22 years later. Tennessee law bars suit after 20 years where no tax has been paid by the plaintiff.
>
> Since no facts seem to be in dispute, the summary judgment should be granted. Earlier Mr. Smartt, I thought you were right, but I've changed my mind on this thing and after our last argument on this, I believe you're on the short end of the stick. So I had to change the whole thing around. I believe you can quitclaim an expectancy. It's a good question.
>
> . . . .
>
> The Court Reporter may transcribe what I have just stated and put in your Final Order, I'll be happy to sign it.

The judgment granted defendant's motion for summary judgment and dismissed plaintiff's suit.

On appeal, plaintiff presents two issues, as follows:

> 1. Did the Trial Court err in granting summary judgment requested by defendant where a material issue of fact was in controversy?
>
> 2. Did the Trial Court err in determining that the deed at issue conveyed the grantor's after-acquired interest to the defendant herein?

The second issue, which is specific, will be considered first. It is evident from the above quoted oral remarks of the Trial Judge that he was of the opinion that the December 4,

1961, deed of L.D. Fuston, Jr., conveyed not only the interest in the property which he owned on the date of the deed, but also any and all interest which he might thereafter acquire by any means, including inheritance from his mother.

This Court cannot agree. The deed in question states:

> I, . . . do remise, release, quitclaim and convey . . . all my right, title, interest and claim in and to the following described land . . . .
>
> . . . .
>
> This deed is intended to convey whatever interest that I may (sic) in the above tracts or parcels of land.

The deed contains no covenant or warranty that the conveyor owns any particular interest in the land.

At the time of the execution of the deed, the conveyor owned only the one-fourth interest in the land which he inherited from his brother, W.C. Fuston. This one-fourth interest passed under the quoted deed, and is not involved in the present case.

At the time of the deed, L.D. Fuston, Jr. owned no other interest in the subject property, but his mother, Ella Fuston, owned a one-half interest, and L.D. Fuston, Jr. had no interest whatever in his mother's share at that time. His expectation of inheriting a part of his mother's property was not a vested right, but a mere expectation, requiring that his mother's ownership continue to her death, that he survive her, and that she fail to make other testamentary disposition of her interest in the property.

An expectation of inheritance may be assigned, *Taylor v. Swafford*, 122 Tenn. 303, 123 S.W.350, 25 L.R.A. N.S. 442 (1909), but there is no suggestion of such assignment in the deed of December 28, 1961.

If there be no warranty of title, the vendee acquires only such title as the vendor had at the time of the sale, and any title subsequently acquired by the vendor does not inure to the benefit of the vendee. *Gookin v. Graham,* 24 Tenn., 5 Humphries 480 (1844).

Absent such an assignment, warranty or covenant, the defendant acquired by said deed no right in or claim to the 1/2 interest owned by Ella Fuston at the time L.D. Fuston, Jr. signed the December 28, 1961, deed.

Essentially, the December 28, 1961, deed transferred all of the present interest of the conveyor. *Southern Iron & Coal Co. v. Schwoon,* 124 Tenn. 176, 135 S.W. 785 (1910). Since it did not purport to convey a fee, or complete title, it created no obligation to surrender an after-acquired interest in the property.

In order to be the subject of a valid grant, an interest in land must exist in possession, reversion or remainder, or by executory devise or contingent remainder, and be something more than a bare possibility of an interest which is uncertain. *Board of Education of Humphries County v. Baker,* 124 Tenn. 39, 134 S.W. 863 (1910).

A mere uncertain possibility of an interest in land or a mere possibility not coupled with an interest may not be conveyed. 26 C.J.S. Deeds §16, p.605.

For the foregoing reasons, the 1/4 undivided interest inherited by L.D. Fuston, Jr. from his mother upon her death on May 23, 1962, was not conveyed by the deed previously executed by L.D. Fuston, Jr. on December 28, 1961. The Trial Court erred in holding otherwise.

The first, general issue, requires consideration of several contentions. Defendant asserts sole title by her sole possession and control of the property for more than thirty-four

years. There is no transcript or narrative statement of the evidence, and the technical record contains no evidence of defendant's possession or control of the property for any period of time. The existence of a recorded deed to a part interest in property is no evidence of possession or control.

Moreover, the possession of land by one tenant in common is presumed to be for all the tenants owning the same, for every presumption is that the possession is in subordination to the title of the true owners. To remove the presumption, the fact must be affirmatively proved, not merely that one tenant held possession for himself alone and adversely to his cotenants, but that his cotenants had full knowledge of such adverse claim and holding during all the time of adverse holding. *Drewery v. Nelms,* 132 Tenn. 254, 177 S.W. 946 (1915), *Marr v. Gilliam,* 41 Tenn. (1 Coldwell) 488 (1860); *Hubbard v. Wood,* 33 Tenn. (1 Sneed) 279 (1853).

A cotenant may lose his rights by actual ouster from the premises, but a silent possession, unaccompanied by some act which amounts to an exclusion and ouster of other cotenants cannot be construed as an adverse possession. *Drewery v. Nelms,* 132 Tenn. 254, 177 S.W. 946 (1915).

Defendant also argues that plaintiff's rights are barred by non-payment of taxes as provided by T.C.A. §28-2-110. There is no evidence in this record as to payment or non-payment of taxes. Defendant argues that, in the absence of a transcript or statement of the evidence, it is presumed that the evidence supports the finding of the Trial Judge. The cited rule applies to appeals after trial upon the merits, but not to appeals from summary judgments.

Moreover, evidence that tenants in common occupied a premises for more than 20 years, paid taxes, made repairs, collected rent and appropriated same to themselves; but gave

no notice of an adverse claim, is insufficient to establish ouster of other cotenants. *Memphis Housing Authority v. Mahoney*, 50 Tenn. App. 117, 359 S.W.2d 851 (1962); *Eckhardt v. Eckhardt*, 43 Tenn. App.1, 305 S.W.2d 346 (1957).

The Trial Judge did err in granting summary judgment to the defendant because the defendant did not present uncontradicted evidence which entitled her to judgment as a matter of law. T.R.C.P. Rule 56.03; *Gray v. Amos*, Tenn. App. 1993, 869 S.W.2d 925.

The judgment of the Trial Court is reversed and vacated. Costs of this appeal are taxed against the defendant-appellee. The cause is remanded to the Trial Court for further proceedings.

Reversed and Remanded.

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HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

_____
BEN H. CANTRELL, JUDGE

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WILLIAM C. KOCH, JR., JUDGE