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REAL PROPERTY

WIFE'S CONVEYANCES OF COMMUNITY PROPERTY

IN *Magee v. Young*,[1] the following question was presented: What is the result of a deed executed by the husband and wife covering non-homestead community property, where the husband's name does not appear in the granting clause?

The Supreme Court treated the deed as inoperative as a conveyance, but as a valid contract for the sale of land. This doctrine that a defective deed may equal a good contract to convey land is recognized by other jurisdictions,[2] and the principle has been adopted in Texas by statute.[3]

In the case of *Mondragon v. Mondragon*[4] the owner of land signed a receipt for $160 as payment for his interest in the land, and it was held that such receipt should be treated as a valid contract to convey. In the principal case the husband in signing the deed was held to have acknowledged receipt of the consideration paid. The court reasoned that the principle of the *Mondragon* case was applicable to the transaction here in question with respect to the creation of a valid contract to convey and the passing of equitable title.

Since in the principal case, the court held that equitable title

[1] 145 Tex. 485, 198 S. W. (2d) 883 (1947).

[2] Swindall v. Ford, 184 Ala. 137, 63 So. 651 (1913); Rushton v. Davis, 127 Ala. 279, 28 So. 476 (1900); *See* Naill v. Kirby, 162 Ark. 140, 257 S. W. 735, 739 (1924).

[3] TEX. REV. CIV. STAT. (Vernon 1925) Art. 1301. "When an instrument in writing, which was intended as a conveyance of real estate, or some interest therein, shall fail, either in whole or in part, to take effect as a conveyance by virtue of the provisions of this chapter, the same shall nevertheless be valid and effectual as a contract upon which a conveyance may be enforced, as far as the rules of law will permit."

[4] 113 Tex. 404, 257 S. W. 215 (1923).

passed under the deed operating as a land contract, it was not deemed necessary to determine whether the transaction in question passed legal title. However on rehearing the doctrine was expressly recognized that a deed to non-homestead community property executed by the wife alone with the consent of the husband will vest legal title in the vendee.

This latter principle was recognized in the early case of *Thomas v. Chance*[5] which first construed the Texas statute governing the conveyance of community property. That statute provides strictly that the community property "... may be disposed of by the husband only..."[6] However, the *Thomas* case in construing this language stated:

> "... although it may be the exclusive right of the husband, as the acting partner, to control and dispose of the community property, yet he may, expressly or by implication, invest his wife with all the authority possessed by himself over the community."[7]

This doctrine is well settled, and has been reaffirmed by later decisions.[8]

The decisions are not uniform with respect to the question of whether the husband's consent for the wife to convey non-homestead community property must be prior to the conveyance.[9]

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[5] 11 Tex. 634 (1854).

[6] TEX. REV. CIV. STAT. (Vernon 1925) Art. 4619.

[7] 11 Tex. 634, 637-638 (1854).

[8] Leyva v. Rodriquez, 195 S. W. (2d) 704 (Tex. Civ. App. 1946) *no reversible error*; Hanks v. Leslie, 159 S. W. 1056 (Tex. Civ. App. 1913) *error ref'd.*; Couch v. Schwalbe, 51 Tex. Civ. App. 94, 111 S. W. 1046 (1908) *error ref'd.*; Fox v. Brady, 1 Tex. Civ. App. 590, 20 S. W. 1024 (1892).

[9] In Thomas v. Chance, 11 Tex. 634 (1854), there appears to have been actual consent at the time of the conveyance. There is however dictum in the case which states that the authority may be given previously or subsequently to the act, either expressly or by implication. Laster v. Jamison, 203 S. W. 1151 (Tex. Civ. App. 1918) *error ref'd.*, is contra. The court there held that a conveyance by the wife of the community property without the prior consent of the husband was a nullity, and therefore it could not be ratified by subsequent acquiescence, but could be ratified only by an act having the essential elements of a conveyance. In the case of Leyva v. Rodriquez, 195 S. W. (2d) 704 (Tex. Civ. App. 1946) *no reversible error*, the wife made a conveyance without the prior consent of the husband. The husband subsequently ratified the act by affixing his signature to the deed. The court held that the conveyance was effective. This decision is in accord with the dicta as before stated in the Thomas case.

ADVERSE POSSESSION BY RIPARIAN OWNERS—WHAT IS THE EFFECT OF A RECORDED OIL AND GAS LEASE UNDER THE 10 YEAR STATUTE OF LIMITATIONS?

Heard v. State[10] was a suit in trespass to try title instituted by the State and the town of Refugio against Mrs. Heard and the Huston Oil Co., her oil lessee. The land in controversy was part of a river bed. The river though navigable in law was not navigable in fact. By virtue of a statute[11] the State had relinquished four-fifths of its interest in the river to the town of Refugio. The defendants' claimed limitation title to the town's interest in the river bed by virtue of ten years adverse possession.

The land in question was not separately fenced, but there were fences separating the 600-acre Heard tract from the surrounding land. There were fences on each side of the 600-acre tract crossing the stream with "water gaps." The fence on the west side touched the disputed river bed. Mrs. Heard erected the fences, above described, for the purpose of keeping the cattle upon her land, and so that they might have access to the stream.

The defendant oil company, under a recorded oil and gas lease on the entire 600-acre tract, including the land in question, had installed a pipe line across the river, but had not drilled in the river bed.[12]

It was held, three justices dissenting, that Mrs. Heard in the erection of the fences and the pasturing of her cattle upon the land in question, was merely exercising her rights as a riparian owner and was using the river bed as a convenience and a privilege, not under a claim of right inconsistent with and hostile to the claim of the town; that the laying of the pipe lines by the oil company would at most give them an easement against the town.

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[10] ___ Tex. ___, 204 S. W. (2d) 344 (Tex. Sup. Ct. 1947).

[11] TEX. REV. CIV. STAT. (Vernon 1925) Art. 5414a.

[12] It was not shown whether the pipe line was operated under Tex. Rev. Civ. Stat. (Vernon 1925) Art. 1497, or as a private line. This statute provides that an oil company "... shall have the right to lay its pipes and pipe lines across and under any... stream in this state...."

The statutory requirements of adverse possession were not met by the petitioners.[13]

To constitute adverse possession sufficient to vest title in the adverse claimant, such possession must be continuous and uninterrupted for the statutory period, and must be actual, notorious, distinct and hostile, and of such character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant.[14]

As pointed out by the court the town could not have fenced off the river bed without impairing the rights of the riparian owners; and the riparian owners because of the nature of the river bed and their adjoining land, could not have enclosed their cattle on their lands and fully participated in their rights as riparian owners without extending their fences across the river bed. It is clear that the use and possession of the land in question by Mrs. Heard was insufficient to satisfy the requirements of the adverse possession statutes.

Not considered by the court are two recent decisions which might have been applicable in the present case.[15] The courts in these cases stated that to obtain title by limitation it was necessary for the adverse possession to be of such a nature as would expose the possessor to some liability for what was done by him or under his authority during the limitation period. Under this doctrine Mrs. Heard would not have obtained title by adverse possession, because she incurred no liability through the prudent exercise of her riparian rights.[16]

The dissent reasoned that the oil company's use of the land

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[13] TEX. REV. CIV. STAT. (Vernon 1925) Art. 5515, "'Adverse possession' is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another."

[14] Evans v. Templeton, 69 Tex. 375, 6 S. W. 843 (1887); Satterwhite v. Rosser, 61 Tex. 166 (1884).

[15] Brownlee v. Landers, 166 S. W. (2d) 734 (Tex. Civ. App. 1942); Niendorff v. Wood, 140 S. W. (2d) 161 (Tex. Civ. App. 1941) *error ref'd.*

[16] *See* Parker v. El Paso County Water Improvement Dist. No. 1, 116 Tex. 631, 642-643, 297 S. W. 737, 742; Stacy v. Delery, 122 S. W. 300 (Tex. Civ. App. 1909).

under its recorded lease was sufficient assertion of ownership to notify the world of its adverse claim.

Assuming, as held by the majority, that the mere laying of pipe lines in the present case was not sufficient to constitute adverse possession, the question is then presented: what is the effect of a recorded instrument covering the land in question when the possession and use is insufficient to constitute adverse possession?

The mere record of a deed is not of itself possession, and in fact is not notice of an adverse claim.[17] It is actual possession of the land that gives notice of the adverse claim.[18] In *Holland v. Nance*,[19] the court states that when the adverse claimant has actual possession of the land, and has a deed for it upon record, the record is notice as to the character and extent of his claim. Assuming that the defendant oil company in the present case had sufficient possession[20] to refer the owner to the recorded instrument, what is the character of his claim?

The usual oil and gas lease conveys to the oil and gas lessee a determinable fee in the mineral estate[21] and an easement in the

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[17] Holland v. Nance, 102 Tex. 177, 114 S. W. 346 (1908).

[18] *See* McKee v. Stewart, 139 Tex. 260, 270; 162 S. W. (2d) 948, 953 (1942). See also Rosborough v. Cook, 108 Tex. 364, 366; 194 S. W. 131, 132 (1917) in which the Court stated: "The law of limitation of actions for land is founded upon notice. The title by limitation ripens primarily, only because, in such manner and for such period of time as the different statutes require, notice is given of the hostile claim. Under the three years statute, it is afforded by possession under title or color of title. Under the ten year statute, simply by possession. And under the five years statute, it is given by possession, the payment of taxes, and the registration of a naked deed."

[19] 102 Tex. 177, 114 S. W. 346 (1908).

[20] In Hill v. Harris, 26 S. W. 823 (Tex. Civ. App. 1901), the question of sufficiency of possession to send the true owner to the record to ascertain the extent of the claim was presented. The court was of the opinion that the record of a deed is not notice to the true owner until some act is upon the land amounting to adverse possession. It has been stated that under the ten year statute the fact that the occupier claims under a deed, or other muniment of title, does not effect the operation of the law in relation to notice, except in cases where more than 160 acres of land is involved. *See* Neal v. Pickett, 280 S. W. 748, 752 (Com. App. 1926); *See* Rosborough v. Cook, 108 Tex. 364, 366, 194 S. W. 131, 132 (1917).

[21] 31-A TEX. JUR. 208 § 127 (1947); Corzelius v. Harrell, 143 Tex. 509, 186 S. W. (2d) 961 (1945); Normandie Oil Corporation v. Oil Trading Co., 139 Tex. 402, 163 S. W. (2d) 179 (1942).

surface estate for the purpose of the mineral grant.[22] The lessor retains ownership in the surface[23] subject to the lessee's mineral easement.[24] In view of the foregoing, it would seem that a recorded oil and gas lease would define the character and extent of the lessee's claim as merely an easement, and would not purport to grant any other claim in the surface.

UNMARRIED DAUGHTER'S RIGHT TO HOMESTEAD

In *Carson v. McFarland*[25] the parties to the suit entered into a stipulation whereby it was agreed that if the court found that the plaintiff, an unmarried daughter, was remaining with her deceased father as a constituent member of his family at the time of his death, then all property described in the plaintiff's petition was exempt from forced sale under the Constitution and laws of this state.

After the death of her mother in 1939 the plaintiff visited a sister in another city. Thereafter she entered a business college in a city other than the city of the family residence. From 1941 to 1943 the plaintiff was employed outside of the state. It is not clear whether she returned to the family residence after leaving in 1939.

The trial court found that at the time of the death of her father in 1942, she was a constituent member of his family. The controlling reason for the trial court's holding seems to be the fact that the plaintiff did not intend ". . . . to establish any residence other than that of the family residence . . ."[26] The present court was of the opinion that the facts supported the holding of the trial court and affirmed its judgment. The conclusion of the court was

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[22] 31-A TEX. JUR. 208 § 127 (1947).

[23] 31-A TEX. JUR. 191 § 118 (1947); Greer v. Caldwell-Guadalupe Pick-Up Stations, 286 S. W. 1083 (Com. App. 1926).

[24] 31-A TEX. JUR. 191 §118 (1947).

[25] 206 S. W. (2d) 130 (Tex. Civ. App. 1947).

[26] 206 S. W. (2d) 130, 131 (Tex. Civ. App. 1947).

based upon the principle that our exemption laws are to be liberally construed in favor of the claimant.[27]

The rights of survivors to exemptions in Texas are governed by statute. The statute in which we are here concerned provides that the court shall

> "... set apart for the use and benefit of widow and minor children and *unmarried daughter remaining with the family* of the deceased, all such property of the estate as may be exempt from execution or forced sale by the constitution and laws of the State...."[28]

An earlier case stated that the test for determining whether the homestead exemption of property continues after the death of the owner is whether such owner left surviving a husband or wife, a minor child, or unmarried daughter *residing* with the family.[29]

From the facts it is clear that the plaintiff's domicile continued at the family homestead.[30] It would appear, however, that the plaintiff definitely established a residence outside of the state. Domicile and residence are not synonymous, as residence means living in a particular location and simply requires bodily presence as an inhabitant in a given place, while domicile means living in

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[27] "From the early days of the Republic to the present time Texas has been the refuge of the unfortunate of other countries. Her very existence as a government was conceived in her colonization laws. Her homestead and exemption laws, founded in wisdom and liberality, have ever been jealously guarded by her statesmen and jurists; and to this, doubtless, as much as to any other cause, we are indebted for our rapidly-increasing population and the development of our industrial resources." Black v. Rockmore, 50 Tex. 88, 96 (1878); Cullers v. James, 66 Tex. 494, 1 S. W. 314 (1886); *See* Reconstruction Finance Corp. v. Burgess, 155 S. W. (2d) 977, 980, *error ref'd*; Clark v. Vitz, 190 S. W. (2d) 736 (Tex. Civ. App. 1945).

[28] TEX. REV. CIV. STAT. (Vernon's 1925) Art. 3485.

[29] *See* Kay v. Thompson, 40 S. W. (2d) 884, 885 (Tex. Civ. App. 1931), *affirmed in* 124 Tex. 252, 77 S. W. (2d) 201 (1934). "The unmarried daughters to whom exemption rights survive are only such as are residing with the family of the deceased at the time of his death...." NUNN, TEXAS HOMESTEAD, 235, 236 (1931). Reconstruction Finance Corporation v. Burgess, 155 S. W. (2d) 997 (Tex. Civ. App. 1941), *error ref'd.*

[30] One acquiring a domicile does not lose it without removal from it with intent not to return. Graves v. Campbell, 74 Tex. 576, 12 S. W. 238 (1889). The domicile remains unaffected by a temporary residence abroad, and is not changed until a new one is formed by settlement in a new place with the intention of there remaining for an indefinite time. Stone v. Phillips, 142 Tex. 216, 176 S. W. (2d) 932 (1944).

such locality with intent to make it a fixed and permanent home.[31] It is generally said that a person may have several residences,[32] although he can have but one domicile.[33]

Assuming the plaintiff was a resident at the family homestead at the time of her father's death, it would seem that the statutory mandate of remaining[34] with the family would require that she be living with her father at that time in order to be eligible for the exemption.[35] However, it would appear that the case at hand considered an unmarried daughter domiciled at the family homestead to be "remaining with the family."

PRESUMPTION OF INTENT TO CONVEY TO CENTER OF HIGHWAY

The question presented in *Goldsmith v. Humble Oil & Refining Co.*[36] was whether a deed conveyed a small tract of land not therein described. The Supreme Court in reversing the Court of Civil Appeals[37] answered in the negative. The basis of the decision was the fact that upon the land in controversy there was not an existing road, passageway or alley in which an easement had been created or acquired when the deed was executed.

It is a well established rule in Texas that when a conveyance

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[31] Pecos & N. T. Ry. Co. v. Thompson, 106 Tex. 456, 167 S. W. 801 (1914); Major v. Loy, 155 S. W. (2d) 617, 621 (Tex. Civ. App. 1941); 1 BEALE, CONFLICT OF LAWS, § 10.3 (1935).

[32] Pittsburg Water Heater Co. v. Sullivan, 115 Tex. 417, 282 S. W. 576 (1926); Brown v. Boulden, 18 Tex. 432 (1857).

[33] Cross v. Everts, 28 Tex. 524 (1866); Johnson v. State, 267 S. W. 1057, 1058 (Tex. Civ. App. 1925), *error ref'd.*

[34] The Texas Supreme Court has approved the Webster International Dictionary definition of the word remain: "... to continue unchanged in place...." Tinkle v. Sweeney, 97 Tex. 190, 192, 77 S. W. 609, 610 (1903).

[35] "... A daughter who is separated from her husband and who is living with the family of the deceased does not come within the meaning of the word "unmarried," although she comes within the term "residing with the family." But a daughter, whose husband is dead, or a daughter, who has been divorced from her husband, *if she be living with the family* of the deceased at the time of his death, takes the exemption." NUNN, TEXAS HOMESTEAD, 336 (1931). In contrast to note 27, *supra*, it has been stated that: "... the doctrine of the homestead claim may have been stretched, yea to the breaking point..." *See* Tiblier v. Perez, 277 S. W. 189, 190 (Tex. Civ. App. 1925).

[36] ____ Tex. ____, 199 S. W. (2d) 773 (1947).

[37] 196 S. W. (2d) 665 (Tex. Civ. App. 1946).

is made of a lot or a tract of land abutting upon a street or highway, the fee in which belongs to the owner of the abutting land, a presumption is indulged that the grantor intended to convey the fee to the center of the street or highway unless a contrary intention is shown.[38]

The court was of the opinion that the facts of the principal case did not justify the utilization of the presumption. There are two distinct differences between the facts of the present case and the facts of the cases cited in support of the rule. The first difference is that in the present case there was no reference to a road or passageway; whereas in the cases cited in support of the rule the deed expressly referred to a road or passageway by which the tract conveyed was bounded. The second distinction is that in the principal case upon the land in dispute there was not an existing road or passageway in which an easement had been created or acquired at the time of the conveyance; whereas in the cases cited in support of the rule the tract conveyed was bounded by a road or passageway in which an easement existed at the time the deed was executed.

The first distinction, above mentioned, would not appear to be controlling. If the land described by metes and bounds is actually bounded by a highway, the fact that the highway is not mentioned as a boundary in the deed does not of itself indicate an intention that the grantee shall not obtain title to the center of the highway.[39] However, to justify the application of the presumption, the court was of the opinion that the existence of a road or passage-

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[38] Cox v. Campbell, 135 Tex. 428, 143 S. W. (2d) 361 (1940); Cantley v. Gulf Production Co., 135 Tex. 339, 143 S. W. (2d) 912 (1940); Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080 (1932). This rule is well established. *See* Anderson v. Citizens Savings & Trust Co., 185 Cal. 386, 197 Pac. 113 (1921); Henaley v. Lewis, 278 Ky. 510, 128 S. W. (2d) 917 (1939); Suburban Land Co. v. Town of Billerecie, 314 Mass. 184, 49 N. E. (2d) 1012 (1943); Talbot v. Massachusetts Mut. Life Ins. Co., 177 Va. 443, 14 S. E. (2d) 335 (1941).

[39] Merchant v. Grant, 26 Cal. App. 485, 147 Pac. 484 (1915); City of Springfield *ex rel.* Koch v. Eisenmayer, 297 S. W. 460 (1927); Cross v. Talbot, 121 Or. 270, 254 Pac. 827 (1927); Durbin v. Roonoke Bldg. Co., 107 Va. 753, 60 S. E. 86 (1908).

way in which an easement has been acquired at the time of the conveyance is essential.[40]

In *Rio Bravo Oil Co. v. Weed*, the Supreme Court of Texas in applying the rule gave as the reason for the presumption of intention to convey to the center of the road or passageway:

> "... the fact that valuable rights and privileges appurtenant to property should be presumed to pass in a conveyance thereof in the absence of a clear and unequivocal intention to the contrary."[41]

The court in that case treats the title to land in the road or passageway burdened with the easement, as an appurtenant right or an incident to the adjoining land, a right or incident of peculiar advantage and value to the owner of the land, which ordinarily passes by a conveyance thereof as essential to its proper enjoyment. In view of the foregoing, the reason for the presumption is not present, and in the absence of such reason the court held that there was no justification for any imputation of intention on the part of the grantor.[42]

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[40] Raleigh-Hayward Co. v. Hull, 167 Wash. 39, 8 P. (2d) 988, 991 (1932), held that by formal vacation of a street the land embraced therein was freed from the public easement and did not pass as an incident or appurtenance to lots thereafter conveyed which bordered on the vacated street. "When the easement ceases, there is no occasion nor justification for any imputation of intention." ELLIOTT ON ROADS AND STREETS, ¶ 1192 (4th ed. 1926). But cf. Anderson v. Citizens Savings & Trust Co., 185 Cal. 386, 197 Pac. 113 (1921). The court in recognizing the presumption treated the street as a monument. The presumption was applied in the absence of an easement. Reference in the deed was made to a map which showed the lot to be bounded by a street. The street, although it was not indicated in the map, had been abandoned by the public. Held, that a street was created between the grantor and the grantee, regardless of whether or not there is an existing dedication as between the grantor and the public. The court implied that the rule might not apply where the street is described as abandoned.

[41] 121 Tex. 427, 440, 50 S. W. (2d) 1080, 1085 (1932). The reasons given for the application of the rule are varied. Some of the reasons advanced by various jurisdictions are: That it is in accord with public policy to prevent disputes and litigation over narrow strips or gores of land, Bowers v. Atchison, T. & S. F. Ry., 119 Kans. 202, 237 Pac. 913 (1925); that the highway is a monument and the boundary line goes through the center of the monument, Helmer v. Castle, 109 Ill. 664 (1884); that the small strip is of little value to the grantor but of great value to the grantee, Mott v. Mott, 68 N. Y. 246 (1877); that retention of such a narrow strip of land would retard the improvement and further alienation of the adjoining property, MacCorkle v. City of Charleston, 105 W. Va. 394, 142 S. E. 841 (1928).

[42] The Court of Civil Appeals found an intention on the part of the grantor to dedicate the land in question to the public as a passageway or alley from recitals in two

BREACH OF WARRANTY—NECESSITY OF EVICTION

In *Schneider v. Lipscomb County National Farm Loan Association*,[43] X conveyed certain land to Y with a covenant of general warranty. The Commissioner of the General Land Office, after determining that a portion of the land conveyed was unsurveyed public land, awarded the same to Z. Y remained in possession of the land and brought suit against Z, without joining X his warrantor, to contest the validity of the Commissioner's award. The Commissioner's award to Z was sustained. A short time after the judgment but more than four years after the award to Z, Y brought the present action against X on the warranty. The question presented is whether the four-year statute of limitations has barred Y's action on the warranty. The Supreme Court held that the action on the warranty was not barred by limitations, because the award by the Land Commissioner was not an authoritative assertion by the state of paramount title. It was further pointed out by the court that even if the award were considered as an authoritative assertion of superior title by the state, there was no eviction, because Y did not yield to the award.

The nature and purpose of a general warranty is to indemnify the purchaser against the loss or injury he may sustain because of a failure or defect in the vendor's title.[44] To constitute a breach of warranty there must be a failure of title, either entirely or in part.[45] A mere cloud upon the title is insufficient.[46] In addition to failure of title there must be an eviction.[47] The earlier decisions required an actual eviction before the suit could be maintained, but under the modern rule the suit can be commenced after con-

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deeds executed several years later and from other subsequent events. The Supreme Court however, stated that the intent of the parties must be determined at the time of the execution of the deed and not from subsequent acts or declarations. *See* Paine v. Consumer's Forwarding & Storage Co., 71 Fed. 626, 631 (1895).

[43] ____ Tex. ____ 202 S. W. (2d) 832 (1947).

[44] *See* Samuel K. McClelland, Adm'r. v. John L. Moore, 48 Tex. 355, 363 (1877).

[45] 12 TEX. JUR. 40 (1931).

[46] *See* Freeman v. Anderson, 119 S. W. (2d) 1081, 1083 (Tex. Civ. App. 1938).

[47] Graebner et al. v. Limburger's Ex'rs., 293 S. W. 1100 (Com. App. 1927).

structive eviction or ouster *in pais*, as exemplified by those instances where paramount title has been asserted against the covenantee and he has yielded to the adverse claim, by surrendering possession or by purchasing the superior title.[48]

It is generally said that a constructive eviction occurs when the facts are such that it would be useless for the covenantee to attempt to retain the title conveyed to him.[49]

Is a yielding necessary to constitute an eviction where the state has asserted superior title to the land warranted? The majority of the court answered in the affirmative. The dissenting opinion reasoned that an assertion by the state of superior title was of itself constructive eviction, and that in such cases there is no necessity of a yielding by the covenantee.

A sale of land by the government may be the equivalent of an eviction,[50] and it has been held when title to land is in the public an attempted conveyance is tantamount to an eviction the instant the deed is made.[51]

The civil appeals case of *Shannon v. Childers*[52] is in accord with the dissent. In that case it was held that the action of the state through its legally constituted authorities, in forfeiting the survey, in legal contemplation amounted to a constructive eviction of the warrantee. There was no finding as to an actual disseizin.

The court in the principal case in commenting on the *Shannon* case disapproved of the principle as therein stated, but stated that the judgment rendered was correct, because there was a constructive eviction when the covenantee acquiesced in the result of the re-survey and yielded to the paramunt title asserted by the owners of the prior surveys.

The reason for requiring a yielding in breach of warranty cases

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[48] *See* Rancho Bonito Land & Live-Stock Co. v. North, 92 Tex. 72, 75, 45 S. W. 994, 996 (1898).

[49] *See* Whitaker v. Felts, 137 Tex. 578, 580, 155 S. W. (2d) 604, 605-606 (1941).

[50] Green v. Irwin, 54 Miss. 450 (1877).

[51] Cover v. McAden, 183 N. C. 641, 112 S. E. 817 (1922); Beecher v. Tinnin, 26 N. M. 59, 189 Pac. 44 (1920).

[52] 202 S. W. 1030 (Tex. Civ. App. 1918), *error ref'd.*

is that a continued possession by the warrantee could ripen into title by adverse possession.[53] The dissent reasons that as the warrantee cannot obtain adverse possession against the state, there is no necessity for a yielding in such cases.[54]

Individuals ordinarily cannot obtain title to state lands by adverse possession,[55] but here the situation is different. The state's assertion of title to public lands is usually made by an award or sale of the same. A purchaser from the state, before the issuance of a patent, has sufficient title through the sale or award to maintain an action in trespass to try title, and this title is subject to divestment by adverse possession, even though the state cannot be barred.[56] It would seem from the foregoing that the court correctly held that the usual rules of eviction should apply to the present case. The reason for requiring a yielding in the ordinary case would appear to prevail in the present case.

In the usual case if the warrantee does not yield to the opposing claim, but remains on the land and obtains title by adverse possession the same will inure to the benefit of the warrantor, and in such case the warrantee will not have a cause of action for breach of warranty.[57] If the award of the Land Commissioner is considered as a constructive eviction of the warrantee he would have an immediate cause of action for breach of warranty. He could thereafter remain in possession and obtain title by adverse possession. It would seem that in any case where this result is possible the better rule would require a yielding on the part of the warrantee, before his cause of action on the warranty accrues.

J. M. K.

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[53] McGregor v. Tabor, 26 S. W. 443 (Tex. Civ. App. 1894).
[54] Staub v. Tripp, 248 Mich. 45, 226 N. W. 667 (1929).
[55] TEX. REV. CIV. STAT. (Vernon's 1925) Art. 5517.
[56] Whitaker v. McCarty, 221 S. W. 945 (Com. App. 1920).
[57] McGregor v. Tabor, 26 S. W. 443 (Tex. Civ. App. 1894).