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Real Property

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nates the objectionable words "or effect," stating that it is against public policy to advertise for sale, offer for sale, or sell below cost "with intent and purpose" of inducing the purchase of other merchandise, unfairly diverting trade from a competitor, impairing fair competition, or injuring the public welfare, where the result is to tend to deceive any purchaser, substantially lessen competition, unreasonably restrain trade, or create a monopoly. Particularly significant is a section making these activities "prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition."[13] The provisions relating to the calculation of costs of goods were changed so as to define cost as the invoice cost or the replacement cost plus a proportionate cost of doing business less certain appropriate discounts.

Whatever limitations the Oklahoma courts may place upon legislation of this type, the Legislature of Oklahoma is determined to keep the act upon the statute books. Of the other Southwestern States Arkansas[14] and Louisiana[15] have unfair sales acts similar to the Oklahoma statute. Texas and New Mexico have not enacted such legislation. *James S. Conley.*

REAL PROPERTY

Adverse Possession (Arkansas)

Two opinions of the Supreme Court of Arkansas, rendered three weeks apart, affirmed an established rule in Arkansas that in boundary disputes a mistake as to the true boundary is material, and that an intention to claim title to the disputed boundary as located is essential in establishing adverse possession of the land of another.

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[13] *Cf.* similar provision in the Robinson-Patman Act, 49 Stat. 1526, § 1(b) (1936); 15 U.S.C.A. § 13(b).

[14] Ark. Stat. 1947 Ann. § 70-303.

[15] La. Gen. Stat. (Dart. 1939) §§ 4931.1—4931.8.

In *Hickey v. Faucette*[1] the property in dispute was a strip of land off one side of a lot which was six inches wide at one end and two inches wide at the other end. In *Carter v. Roberson*[2] two neighbors contested title to a strip of land about seven feet wide.

The facts of the two cases were generally similar in that the disputed boundary lines were marked by a hedge in one case and a garage, driveway, and fence in the other. Both defendants had held adverse possession of the land up to the disputed boundary for more than seven years. In both cases the true boundary line established by a surveyor showed there had been a mistake as to the location of the boundary between the properties owned by the plaintiffs and defendants.

The court, in finding for the defendant in both instances, stated the rule established in *Goodwin v. Garibaldi*:[3]

> "When a landowner, through mistake as to his boundary line, takes possession of land of an adjacent owner, intending to claim only to the true boundary, such possession is not adverse, and, though continued for the statutory period, does not divest title, *but when he takes possession of the land under the belief that he owns it, encloses it, and holds it continuously for the statutory period, under a claim of ownership, without any recognition of the possible right of another thereto on account of mistake in the boundary line, such possession and holding is adverse, and when continued for the statutory period will divest the title of the former owner, who has been thus excluded from possession.*" (Italics supplied by the court.)

From the evidence presented in both cases the court found that defendants had intended to claim ownership to the disputed boundary line, thereby bringing the issue within the italicized portion of the rule.

Arkansas, in its line of decisions following the *Garibaldi* case, aligns itself with other jurisdictions, including Texas,[4] which hold

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[1] 214 Ark. 560, 217 S. W. 2d. (1949).

[2] 214 Ark. 750, 217 S. W. 2d. 846 (1949).

[3] 83 Ark. 74, 102 S. W. 706, 707 (1907).

[4] Tucker v. Angelina County Lumber Co., 216 S. W. 149 (Tex. Civ. App. 1919).

that the fact of possession of another's land under mistake is material, and that an intention to claim title to the boundary, as located, in spite of any mistake, must be found, such intention being essential to adverse possession.

The rule established in Arkansas is more strict than the rule of other jurisdictions wherein the courts have held that possession is adverse, without reference to the fact that it is based on mistake, it being sufficient that there is an actual and visible possession without any reference to the fact that it is based on mistake, it being sufficient that there is an actual and visible possession without any recognition of the other's title.[5]

NOTICE TO TERMINATE MONTH TO MONTH TENANCY (ARKANSAS)

Arkansas has no statute modifying the common law rule as to notice necessary to terminate a month to month tenancy. Notice to terminate is sufficient if given one month in advance of the day ending the monthly rental period.[6] The fact that the notice ends with the first day of the monthly period rather than the last day has been held not to invalidate it if the notice covered one full rental period.[7]

In *Hastings v. Nash*[8] the Arkansas Supreme Court held that a notice was sufficient even though it did not end on either the first or the last day of the monthly period. In that case the landlord gave written notice on August 9, 1946, to vacate the premises not later than November 9, 1946. The monthly rental period was from the 7th of the month to the 7th of each succeeding month. The court said that the tenant could not complain where he was given longer notice to quit than the law requires.

The holding in *Hastings v. Nash* is at variance with the generally stated rule[9] that a notice to terminate a month to month tenancy

[5] 4 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1159.
[6] Dillon v. Miller, 207 Ark. 401, 180 S. W. 2d. 832 (1944).
[7] *Ibid.*
[8] ——Ark.——, 219 S. W. 2d. 225 (1949).
[9] See 86 A.L.R. 1349 (1933).

must require the tenant to terminate at the end of the monthly period. The result reached in the *Hastings* case seems desirable because the notice given allowed the tenant to quit on the last day of the monthly period or a few days later.

Duty of Life Tenant to Pay Taxes (New Mexico)

In *Zaring v. Lomax*[10] testatrix, who died March 1, 1938, devised a lot in the town of Santa Rosa, New Mexico, to her son for life with remainder to the heirs of his body. In June, 1939, the son of the testatrix conveyed the lot by warranty deed to Fluit without mention of the life estate and remainder. In November, 1939, a child (defendant in the case) was born to the son's wife. On December 4, 1939, the lot was sold for 1938 taxes, the purchaser acquiring a perfected and formal deed on June 1, 1942. On October 1, 1945, Fluit by warranty deed purported to convey the lot to plaintiff. On November 28, 1945, plaintiff purchased the tax deed from its owner, paying the amount of its cost.

Plaintiff contended that his purchase of the tax deed gave him paramount title extinguishing all prior equities and interests. Defendant claimed that he was remainderman under his grandmother's will, that he would own full title upon death of his father, and that plaintiff, as subsequent grantee of the life estate, was under the duty to pay the taxes on the lot in order to preserve the life estate and the remainder.

The general rule is that the life tenant is under a duty to pay taxes assessed during the tenancy.[11] The life tenant cannot acquire adverse title to the property by purchasing it at a tax sale.[12] The purchase of a valid tax title by a life tenant will be held to be for the benefit of the life tenant and the remainderman.[13] Ordinarily, the doctrine of *caveat emptor* is applied to a purchaser of a tax title.[14]

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[10] 53 N. M. 273, 206 P. 2d. 706 (1949).
[11] 4 Thompson, Real Property (Perm. Ed. 1939) § 1620.
[12] 5 Thompson, Real Property (Perm. Ed. 1940) § 2919.
[13] 2 Thompson, Real Property (Perm. Ed. 1939) § 806.
[14] 5 Thompson, Real Property (Perm. Ed. 1939) § 2929.

The New Mexico Supreme Court held that where "one . . . buys a life estate from the tenant for life after a valid tax title had become effective, and thereafter buys the tax title, his purchase inures to the benefit of the whole estate, and will be held in effect a redemption from a tax sale."[15] Therefore, the plaintiff was held to own only a life estate, and the defendant had a vested remainder.

The dissenting opinion in the case took the position that the plaintiff purchased a nullity from Fluit. This purchase was made after the tax title had become effective. Therefore, the plaintiff by purchasing the paramount tax title was entitled to full title. The dissenting opinion found no duty on the part of the plaintiff to redeem the property. This duty was on Fluit who had allowed the tax deed to become effective.

The dissenting opinion points out a serious weakness in the holding of the majority. The statute regarding tax sales allows a valid tax title to extinguish all prior titles, interests and equities. The owner of the tax title in this case had paramount title to the exclusion of both the plaintiff and defendant. The grant of the tax title to the plaintiff reduced the title to a tax redemption renewing the vested remainder and the life estate.

DEEDS—WAIVER OF CONDITION PRECEDENT (OKLAHOMA)

May a grantor waive performance of a condition precedent in a deed by his voluntary acts and silence? That was the question presented for decision in *Stewart v. Colvin.*[16]

Grantor's deed contained a stipulation that grantee should pay $1.00 to each of three named persons before the deed should take full force and effect. Shortly after execution, the deed was delivered to grantee who took possession, paid taxes and insurance, made repairs of the premises, remained in control of the premises until the death of the grantor, and at the time of the suit was still in possession of the premises. The grantee did not pay the amounts

[15] 206 P. 2d. at 708.

[16] ——Okla.——, 214 P. 2d. 229 (1949).

specified in the deed prior to the grantor's death. Plaintiff, administratrix of the estate of the deceased grantor, contended that since the condition precedent had not been performed, title remained in the deceased grantor at the time of his death.

The court recognized that where the terms of a deed create an estate on condition precedent, title will not vest in the grantee until such condition is performed,[17] but further recognized that performance of such condition may, however, be waived by the grantor.[18] The court also cited a rule of waiver as applied to a condition subsequent in *Sanderson v. Davis*.[19]

The court found that, even though it was the intention of the deceased grantor at the time the instrument was drafted that title should not vest or pass to the grantee until the specified payments were made, since the evidence showed that the grantor thereafter voluntarily permitted the grantee to take possession and control of the premises and to continue to occupy and control the same for a period of eight years and until the grantor's death without insisting upon performance of the condition, he thereby waived the condition, and title thereupon vested in the grantee.

Tiffany in his treatise on real property states:

> "There are dicta to the effect that a condition precedent may be waived, as well as a condition subsequent. This, however, appears open to question. The waiver of such a condition involves an attempt to create, instead of a possibility of an estate to commence in futuro, an actual estate commencing immediately, an entirely different interest, and one cannot, in other than exceptional cases, create an estate in land orally, or, it would seem, even in writing, by words of waiver only."[20]

In light of the foregoing statement, the theoretical soundness of the decision may be questioned.

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[17] Fraley Admr. v. Wilkinson, 79 Okla., 21, 191 Pac. (1920); Wellsville Oil Co. v. Miller, 44 Okla. 493, 145 Pac. 344 (1914).

[18] The court relied on statements in 26 C.J.S., *Deeds*, § 158, p. 497.

[19] 89 Okla. 271, 215 Pac. 603 (1923).

[20] 1 TIFFANY, REAL PROPERTY (3d ed. 1939) § 204.

Broker's Commission (Texas)

In *Buratti & Montandon v. Tennant*[21] a real estate broker was suing a seller for a commission on a completed sale. The issue was whether the Statute of Frauds[22] was satisfied. The only written memorandum was the contract between the buyer and seller, which provided that if the buyer failed to consummate the contract, the seller would retain the cash deposit as liquidated damages and would pay the usual broker's commission. The Texas Supreme Court held that the amount of the commission could not be proved without parol evidence and that the written contract did not satisfy statutory requirements.

In the court below it had been held that the memorandum provided for a commission in case of a breach of contract and forfeiture of the cash deposit but not in the case of a completed sale.[23] This holding was contrary to *Spires v. Mann*,[24] which allowed recovery under a similar contract where the amount of the commission was stated explicitly. The theory in the *Spires* case was that the provision for a stated commission gave rise to an implied covenant to pay the same commission in case of a completed sale.

The supreme court did not resolve the conflict between the *Spires* case and the holding of the court of appeals in the principal case. The complete contracts in the two cases were not before the court, and it was unable to say whether a covenant to pay a certain commission would be implied. Thus, the law in Texas remains somewhat unsettled as to whether a contract is sufficient basis for a recovery on a completed sale where the amount of the commission has been stated with certainty only with respect to a breach of contract and forfeiture.

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[21] 147 Tex. 536, 218 S. W. 2d. 842 (1949).

[22] Tex. Rev. Civ. Stat. (Vernon, 1948) art. 6573a22.

[23] 215 S. W. 2d. 201 (Tex. Civ. App. 1948).

[24] 173 S. W. 2d. 200 (Tex. Civ. App. 1943), *writ of error refused.*

SPECIFIC PERFORMANCE OF LEASE CONTRACT (TEXAS)

In the case of *Maloy v. Wagner*[25] plaintiff sought enforcement of a lease contract which was oral and for a three-year term. The trial court decreed specific performance of the contract. The court of civil appeals reversed and rendered for the defendants. A writ of error was granted on plaintiff's petition to determine whether, under the facts presented, the three-year oral contract to lease should be enforced, notwithstanding the Statute of Frauds.[26] The supreme court reversed the court below and affirmed the trial court's judgment.

The trial court found as facts that the three-year lease contract was entered into, that pursuant to such contract the plaintiff entered into possession of the land and fully paid the agreed rent for two years, and that the plaintiff made valuable improvements on the land which were of a permanent nature.

The court of civil appeals had relied upon the rule with reference to oral lease contracts for more than one year stated by Chief Justice Phillips in the case of *Hooks v. Bridgewater*:[27]

> "From an early time it has been the rule of this court steadily adhered to, that to relieve a parol sale of land from the operation of the statute of frauds, three things were necessary: 1. Payment of the consideration. 2. Possession by the vendee. And 3. The making by the vendee of valuable and permanent improvements upon the land with the consent of the vendor; or, without such improvements, the presence of such facts as would make the transaction a fraud upon the purchaser if it were not enforced.... Each of these three elements is indispensable, and they must all exist."

The court of civil appeals in reversing the trial court found (1)

[25] 147 Tex. 486, 217 S. W. 2d. 667 (1949), *rev'g* 212 S. W. 2d. 850 (Tex. Civ. App. 1948).

[26] TEX. REV. CIV. STAT. (Vernon, 1948) art. 3995: "No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawlawfully authorized.... 4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year...."

[27] 111 Tex. 122, 126, 229 S. W. 1114, 1116 (1921).

that defendant Wagner had not consented to the improvements, (2) that plaintiff had made a "nice profit" from his occupation, and (3) that denial of relief would not work a fraud on plaintiff. The supreme court disagreed with the first finding and said that the record showed the contrary. The second finding was held immaterial, and the third finding was held not justified under the facts established.

The supreme court reaffirmed the rule of the *Bridgewater* decision, omitting the statement of the alternative to the making of improvements, since the facts did not call it into operation. In the *Bridgewater* case the alternative had been stated and applied in a situation in which the transferee had not taken possession of or made improvements to the land. The court also referred to a statement in *Jones v. Mawman*[28] that the person seeking to enforce the contract must have "made valuable permanent improvements on the land *in reliance thereon.*" (Emphasis by the court.)

The court concluded that an estoppel was created against the defendants and that a fraud upon Maloy would result if the defendants were permitted to repudiate the contract. Thus, an equitable basis for enforcing the parol agreement was found. The court cited the following statements in support of its decision that a suit in equity would lie:

> "[The courts] . . . *must give heed also to considerations of an equitable character* when the facts warrant, as for instance, when every act of plaintiff may be explained apart from the oral contract in question, and none of his acts are explainable apart from it. In other words, what is done by the parties must supply the key to what is promised."[29] "But where there is payment of the consideration, the surrender of possession, and the making of valuable and permanent improvements on the faith of the purchase with the owner's knowledge or consent, *there is created an estoppel against him and it may fairly be said that*

[28] 145 Tex. 596, 599, 200 S. W. 2d. 819, 820 (1947).

[29] Chevalier v. Lane's, Inc., 147 Tex. 106, 112, 113, 213 S. W. 2d. 530, 533 (1949).

[30] Hooks v. Bridgewater, 111 Tex. at 128, 229 S. W. at 1117.

a fraud upon the purchaser would result if the owner were permitted to repudiate the contract."[30] (Emphasis by the court.)

Earlier cases were cited, among them *Ward v. Etier*,[31] to the effect that where possession was had with the consent of the transferor, it was not necessary for the transferee to allege and prove that the improvements were made with the acquiescence or consent of the transferor. The court said that the cases in which it had been held that the improvements must be made with the knowledge or acquiescence of the transferor at the time they were being made had been situations in which the transferee took possession without knowledge of the transferor or without his consent, or had made the improvements after the lessor had repudiated the contract.[32]

The court stated that the principal case fitted closely into the factual pattern of *Ward v. Etier*.[33] In that case defendant Ward had no knowledge that improvements were being placed on the premises before they were completed. The judgment in that case, decreeing specific performance of a parol contract to lease, was considered decisive of the principal case.

In contrasting the principal case and the *Etier* case with the *Bridgewater* case, the court pointed out there was an essential but not controlling difference, in that in the *Bridgewater* case both parties to the agreement were not before the court to testify, whereas in the principal case, as well as in the *Etier* case, both parties to the agreement were present and testified.

The principal case clarifies the doctrine of the *Bridgewater* decision, particularly with respect to the necessity for consent by the transferor to the making of improvements and with respect to the relevancy of profits made by the transferee. A large area of question remains, however, as to the circumstances which will satisfy the alternative requirement, "presence of such facts as

[31] 113 Tex. 83, 251 S. W. 1028 (1923).
[32] See 101 A.L.R. 923, 1067 (1936).
[33] 113 Tex. 83, 251 S. W. 1028 (1923).