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Security

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would make the transaction a fraud upon the purchaser if it were not enforced," as set forth in the *Bridgewater* opinion.

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SECURITY

TAX LIENS

A recent decision of the Supreme Court of Arkansas[1] involved the question whether or not a tax lien held by the city against certain property was merged in the title obtained by the city to that property upon foreclosure of its tax lien where the city subsequently reconveyed the property to the former owner in exchange for a partial cash payment and notes secured by a deed of trust for the balance. An ancillary question considered by the court was whether a private person who acquired the notes and deed of trust from the city could claim the right of the city to be free from the statute of limitations in respect to such tax lien. A divided court decided that the tax lien survived the foreclosure proceedings and that the purchaser of the deed of trust given by the owner to secure the balance due was entitled to be subrogated to the city's right to be free from the bar of the statute of limitations.

Under the facts of the case the city, through its improvement district, foreclosed a tax lien for delinquent taxes on certain property and received a commissioner's deed to the property. Shortly thereafter, the city agreed to and actually did deed the property back to the original owner in exchange for a substantial cash payment and his notes, secured by a deed of trust on the property, for the balance.

The plaintiff in this suit bought the notes from the city and

[1] Lueken v. Burch, 214 Ark. 921, 219 S. W. 2d 235 (1949).

took an assignment of the deed of trust securing the same. The notes being unpaid, plaintiff brought suit to establish a lien against the property and for foreclosure. Before the suit was filed, the five-year Arkansas statute of limitations had run on the notes and, consequently, on the deed of trust. This fact was pleaded as a defense at the trial, but the issue was decided in favor of the plaintiff for the reasons enumerated below.

First, the court decided that the original tax lien had never been discharged, despite the fact that the lien had been foreclosed by the city improvement district and title obtained by the district, and that the lien remained in force against the land. Second, the court decided that the plaintiff was entitled to be subrogated to the right of the improvement district to foreclose its original tax lien against the land, and since the lien of the improvement district was not avoided by the passage of time, the plaintiff was entitled to like immunity from the statute of limitations.

The dissenting judges contended that there was a merger of the tax lien and the title obtained at the foreclosure sale at the time the city took the deed to the land following the foreclosure proceedings. Generally, in the Southwestern States, this is the case,[2] but involved here was an Arkansas tax statute[3] which previously had been construed to the contrary. Under this statute it had been held that a tax lien could not be discharged until full payment of the taxes due was made, regardless of where the title to the land might rest.[4]

CONSTRUCTIVE TRUSTS

The Texas court in *Cecil v. Dollar*[5] held that the defendant, who had bought in a title, complete as to surface and mineral interests, through foreclosure of an outstanding incumbrance at a trustee's sale, which incumbrance he had expressly agreed to assume, could

[2] 158 A.L.R. 563, 565 (1945).

[3] ARK. STAT. 1941 ANN. § 20-414.

[4] Spikes v. Beloate, 206 Ark. 344, 175 S. W. 2d. 579 (1943).

[5] 147 Tex. 551, 218 S. W. 2d. 448 (1949).

not assert the title so gained against his grantor of the land, who had reserved a one-half mineral interest.

The plaintiff had borrowed money and given notes in exchange, secured by a deed of trust on the land involved in this suit. Subsequently, plaintiff conveyed the surface estate and one-half of the mineral estate in this land to the defendant, who contracted to assume the indebtedness which was covered by the deed of trust. The defendant, although able to pay, defaulted in his payments to the holder of the deed of trust, and the trustee was instructed to sell the land. At the trustee's sale defendant bought in the title, which covered not only the portion of the land and mineral estate conveyed to the defendant but also the one-half mineral interest which the grantor had reserved.

In holding that defendant could not assert the title so acquired against his grantor, the court stated that the purchase of the outstanding incumbrance by the defendant, who was called a cotenant, must inure to the benefit of all the cotenants, and that the purchasing cotenant could acquire no title to the interest of a fellow cotenant by such transaction. The court pointed out that it would be inequitable to allow this defendant to profit by his wrong, and declared the defendant to be a constructive trustee of the one-half mineral interest for the benefit of the plaintiff. The principles of law which formed the basis of the court's opinion have been enunciated previously by the Texas courts.[6]

MECHANIC'S LIENS

The New Mexico court held that where construction work appeared to an owner-vendor of real estate to be a single act performed by one contractor, notice of non-liability under the New Mexico non-responsibility statute[7] would avoid liability for unpaid construction costs and liens after the vendor had legally

[6] Connecticut Gen. Life Ins. Co. v. Bryson, ——Tex.——, 219 S. W. 2d. 799 (1949); Roberts v. Thorn, 25 Tex. 728 (1860); *see* 14 Am. Juris. *Cotenancy*, sec. 51; 46 A.L.R. 322, 336 (1927); 54 A.L.R. 874, 884 (1928).

[7] N. M. STAT. (1941) ANN. § 63-210.

rescinded the contract of sale, although two contractors had been employed by the vendee to make separate improvements to the land.[8]

The vendee, having contracted to buy a parcel of land from the plaintiff, entered into two contracts for the building of additions to existing buildings. The vendee employed independent contractors to do the construction work, and one contractor commenced performance under his contract. The plaintiff promptly posted notice of non-liability in compliance with the statute. Two weeks later the second contractor commenced performance under his contract. He contended that the notice of non-liability was ineffectual as to him. Plaintiff did not have actual notice that the two jobs were being done by distinct contractors.

The court said that as long as the notice was posted properly under the statute and remained posted a reasonable time, and as long as the plaintiff was in good faith in his belief that only one contractor was involved, the court must absolve the plaintiff's land of liability as to both contractors, as directed by the statute.

The New Mexico statute enables a vendor of land to avoid the effect of mechanic's liens filed for unpaid costs of improvements when the vendee who has contracted for the improvements defaults and the vendor rescinds the contract and regains title and possession of the land. There is no similar statute for non-liability in effect in the other Southwestern States. The states from which New Mexico took its statute recognize the rule laid down in the principal case.[9]

Paul Thorp.

[8] Petrakis v. Krasnow, 54 N. M. 39, 213 P. 2d. 220 (1949).

[9] 123 A.L.R. 7, 40 (1939); 36 Am. Juris., *Mechanic's Liens*, sec. 120.