Accession

Harold C. Rector

ACCESSION

THE doctrine of accession is unusual in that it permits a trespasser to acquire title to converted property on which he has done work or added materials. It originated in the civil law, and was incorporated into the common law at an early date. As early as the Yearbook 5 Hen. 7, f. 15, pl.6 (1490), it was stated that one who made malt from grain belonging to another became the owner of the new species.[1] The policy behind the doctrine is to prevent imposition of an excessive penalty on a wrongdoer in certain situations.

As a general proposition title to property remains in the original owner regardless of an improvement by a wrongdoer.[2] The maxim that one cannot be deprived of property except by his own voluntary act or by operation of law is fundamental; only when the property no longer exists in its original state or when it becomes an integral part of another thing, will title pass by accession.[3] The principle of accession is applied to both real and personal property. Accession in real property occurs when a chattel is attached to land and becomes a fixture. This discussion will be limited to the application of the doctrine in the field of personal property.

A chattel may be improved through the use of skill and labor or by incorporation with other materials. When the improvement is accomplished by the latter method, title to the annexed article may pass by adjunction.[4] If the species of the article has been changed, title may pass to the improver by specification.[5]

There is considerable disagreement as to what constitutes a change in species. In a general way a change is accomplished

[1] 2 KENT. COMM. 361; *see* translation of Y. B. 5 Hen. 7, f. 15, pl. 6 (1490), in note to Silsbury v. McCoon, 4 Denio (New York) 332, 335 (1847).

[2] Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307 (1850).

[3] Baker v. Mersch, 29 Neb. 227, 45 N. W. 685 (1890); Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289 (1811).

[4] Peirce v. Goddard, 22 Pick. (Mass.) 559, 33 Am. Dec. 764 (1839).

[5] Reader v. Moody, 48 N. C. 372 (1856); *see* Arnold, *The Law of Accession of Personal Property*, 22 Col. L. Rev. 103 (1922).

where the improvement results in an article which falls into a class different from that of the original article. Statements in some cases would indicate that the relative value of the manufactured product and the original material is more decisive.[6]

In the civil law there was much discussion as to the extent of the change required to pass title from the original owner to the person making the improvement.[7] Justinian states that if the improved article can be reduced to its former materials, the owner of the materials should be the owner of the product; but if the product cannot be so reduced, title should pass to the improver. The early English cases permitted the owner of materials to seize and keep the new article if he could prove the identity of his original materials. Both of these tests have found their way into the American cases.

Many cases which have arisen in this country purport to follow the "physical identity" approach.[8] It is difficult to determine exactly what this means in each case. It is possible to consider that no change in species is effected so long as the new article contains essentially the same substance as the original material. The inadequacy of this test becomes apparent when one considers the instances of cloth made into a coat, or grain made into malt. In the former example title to the coat is thought to remain in the owner of the material, while in the latter, title to the malt passes to the maker.

Statements in some cases indicate that a change in species is considered effected whenever the original material cannot be identified in the new article by use of the five senses. When grain is made into malt or iron into a tool, the original material cannot be identified. By accession, title to the product should be in the improver, but it is stated that the converter of grain will acquire

[6] Weatherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653 (1871); Louis Werner Stave Co. v. Pickering, 119 S. W. 333 (Tex. Civ. App. 1909).

[7] 2 KENT. COMM. 363.

[8] Gaskins v. Davis, 115 N. C. 85, 20 S. E. 188 (1894); Lampton's Executors v. Preston's Executors, 1 J. J. Marsh (Ky.) 454, 19 Am. Dec. 104 (1829); *see* Betts v. Lee, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368 (1810).

title to the malt while the converter of the iron is not entitled to the tool.[9]

The relative value test avoids the more difficult, arbitrary distinctions, and attempts to establish substantial equity. Texas has followed the relative value approach since the turn of the century. In *Texas and New Orleans Railway Company v. Jones' Executors*[10] the innocent trespasser was permitted to retain railway ties which had been made from timber cut on another's land. The ties had a value of 35¢ each; it was agreed that the value of the timber used in making a tie was 6¢. This represents a relative value ratio of 6:1. In an earlier case[11] the owner of timber had been permitted to recover the value of the finished ties. This was distinguished in *Texas and New Orleans Railway Co. v. Jones' Executors* on the ground that the trespasser in the earlier case had acted in bad faith, while in the instant case the improver had acted innocently. In another case[12] it was held that title to staves, which were made from timber belonging to another, passed to the innocent trespasser. The staves were worth $1,080; the timber used had a value of $339. This would indicate that a threefold increase in value is sufficient to pass title.

In other jurisdictions the cases have held that a greater increase in value is necessary before title will pass to innocent improvers.[13] An Arkansas decision refused to permit an innocent trespasser to keep ties which he had made from timber belonging to another where the ratio of values was 6:1.[14] In Louisiana, however, it is indicated that the rule is flexible and more favorable to the trespasser.[15]

---

[9] See Y. B. 5 Hen. 7, f. 15, pl. 6 (1490), and Moore's Report 20, 72 Eng. Rep. R. 411 (1560).

[10] 34 Tex. Civ. App. 94, 77 S. W. 955 (1903).

[11] Missouri, Kansas & Texas Railway Co. v. Starr, 22 Tex. Civ. App. 353, 55 S. W. 393 (1899) *er. ref.*

[12] Louis Werner Stave Co. v. Pickering, 119 S. W. 333 (Tex. Civ. App. 1909).

[13] The Isle Royal Mining Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520 (1877).

[14] Eaton v. Langley, 65 Ark. 448, 47 S. W. 123 (1898).

[15] See LA. CIV. CODE (Dart, 1945) arts. 525, 526 and Whitehead v. Dugan, 25 La. Ann. 409 (1873).

Under Texas law it would appear that a willful trespasser can never acquire title to improved goods solely on the basis of an increase in value. In *Kirby Lumber Co. v. Temple Lumber Co.*[16] a portion of the opinion in *Louis Werner Stave Co. v. Pickering*[17] is quoted with approval:

> "The general rule is that the owner of property has the right to all that becomes united or attached to it by accession; but when such accession is produced by labor of another, and the identity of the property is thereby changed and its value greatly increased, the right to the property in its changed condition depends upon whether the person converting it acts in good faith believing that the property was his at the time of the conversion. If taken under these circumstances, the title to the property in its changed condition passes by accession to the person by whose labor its value has been so increased, and the original owner can only recover the value of the property in its condition at the time of the taking. On the other hand, a willful trespasser can acquire no right in property, it matters not how much he may increase its value, for the law will not permit one to take advantage of his own wrong."

If this broad statement is followed, it appears that in Texas, no matter how great the change in identity, the willful trespasser would never get title. A textwriter has indicated that where the change was great enough, willful improvers might acquire title to the new product.[18]

Whenever the original owner is entitled to the improved article, he may elect to recover the article or damages. The proper measure of damages in the case of a willful trespasser is the enhanced value. If the trespasser was innocent, only the original value is recovered. But if the improver is entitled to the new species, the original owner's remedy is recovery of the value of the converted property before improvement.[19] It is likely that Texas would fol-

[16] 125 Tex. 284, 301, 83 S. W. 2d 638, 648 (1935).

[17] 119 S. W. 333 (Tex. Civ. App. 1909).

[18] See BROWN, LAW OF PERSONAL PROPERTY (1936) 48.

[19] Kirby Lumber Co. v. Temple Lumber Co., 125 Tex. 284, 83 S. W. 2d 638 (1935); Missouri, Kansas & Texas Railway Co. v. Starr, 22 Tex. Civ. App. 353, 55 S. W. 393 (1899) *er. ref.*

low the rule of most jurisdictions permitting an innocent purchaser who has improved an article sufficiently to retain it even though it was purchased from a willful trespasser. One case[20] indicates a bona fide purchaser from a bona fide accessioner would be liable only for the value of the original article. In Texas the *fides* of the party making the improvement assumes great importance.

It has been held that a willful trespasser can acquire title by accession where the owner with knowledge acquiesces in the improvement.[21] This would not be true under the broad statement in the *Kirby Lumber* case.

When the goods of two different owners are joined together in such a way that they cannot be separated without material injury, the owner of the principal part gets title.[22] This is accession by adjunction. It operates regardless of the mala fides of the converter. The policy of the rule rests upon the desire to maintain property in its most useful state. When the article can be separated without impairing the usefulness of the principal good, there is no necessity for passing title to the owner of the principal part. This phase of the doctrine is often involved when accessories or tires are sold under seller's lien and placed on a mortgaged vehicle. Most jurisdictions have permitted the seller to recover the tires or accessories upon default and when the mortgage on the vehicle was foreclosed where title to the additions was reserved by the seller.[23] Both Arkansas and Oklahoma would permit conditional sellers to recover severable accessories and parts when title has been reserved.[24] In jurisdictions where the lien theory of mortgages is followed, sellers of severable additions have been allowed to retake

---

[20] Texas & New Orleans Railway Co. v. Jones' Executors, 34 Tex. Civ. App. 94, 77 S. W. 955 (1903).

[21] See Single v. Schneider, 30 Wis. 570 (1872).

[22] Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582 (1851); Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289 (1811); Ochoa v. Rogers, 234 S. W. 693 (Tex. Civ. App. 1921) *er. dism'd.*

[23] Blackwood Tire & Vulcanizing Co. v. Auto Storage Co., 133 Tenn. 515, 182 S. W. 576 (1916); *see* 15 Tex. L. Rev. 140 (1936).

[24] Motor Credit Co. v. Smith, 181 Ark. 127, 24 S. W. 2d 974, 68 A. L. R. 1239 (1930); K. C. Tire Co. v. Way Motor Co. 143 Okla. 87, 287 Pac. 993 (1930).

them where a security interest had been reserved.[25] There are a few cases which have put emphasis upon the after-acquired provisions of the mortgage contract in holding that the accessories passed with the vehicle at foreclosure.[26] The after-acquired clause should be effective between the parties to the contract, but it should not affect the innocent seller's right to the addition at default.

Texas in this instance has followed the preferred application of the rule of accession. In *Firestone Service Stores v. Darden*[27] an unpaid vendor sold tires to a purchaser who placed them on his mortgaged automobile. Upon foreclosure of the mortgage on the automobile, the vendor was permitted to recover the tires. The court reasoned that the seller had retained his security interest and the parts in question could be severed from the vehicle without injury. It has been held that after-acquired provisions of the mortgage are not controlling in determining if accessories have become part of the vehicle by accession.[28] The severability of the accessories assumes great importance if title or security interest is reserved by the seller. The result seems proper because the owner of the mortgage on the automobile still has the security he initially obtained. If a part has been removed, he has an action for impairment of his security.

A recent case[29] of interest involved a situation in which the article had a greater value in its constituent parts than as a unit. A combination spudder and drilling rig was sold to a purchaser, who had knowledge that the machinery was subject to a chattel mortgage. The purchaser separated the machine into two drilling rigs. The value was increased, and the purchaser claimed the two new machines free of the mortgage by accession. It was held that the mortgage was effective between the parties and as against purchasers with notice regardless of how much the article might be

[25] Lincoln Road Equipment Co. v. Bolton, 127 Neb. 224, 254 N. W. 884 (1934).

[26] Twin City Motor Co. v. Rouzer Motor Co., 197 N. C. 371, 148 S. E. 461 (1929).

[27] 96 S. W. 2d 316 (Tex. Civ. App. 1936).

[28] Star Finance Corp. v. Chain Investment Co., 146 S. W. 2d 291 (Tex. Civ. App. 1940).

[29] Hodges v. Leach, 214 S. W. 2d 837 (Tex. Civ. App. 1948).