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acted in like manner and dispose of the controversy accordingly—without undertaking to determine whether the party in the case at hand is more or less benighted than his predecessor. The advantage of such a policy would not be limited to making easier the work of courts. Its adoption would impart a degree of certainty to the body of precedents in such cases, which would enhance their value as a guide to attorneys and litigants.

But it was that inflexibility of legal standards, so convenient to courts of law, which gave rise to equity jurisdiction in the first place. Whatever the certainty of precedent and the rigidity of abstract principles, cases will arise in which peculiar circumstances will seem to call for relief from the operation of those rules and principles. In the words of Justice Smedley, "If this cannot be done, what is a court of equity for?"⁴² The question—and regrettably it remains a question at the end as it was at the beginning of this discussion—is whether or not the inexperience, lack of education, or substandard intellectual capacity of a litigant may ever be numbered among those peculiar circumstances.

Robert R. Sanford.

PASSAGE OF EQUITABLE TITLE IN TEXAS UNDER AN EXECUTORY CONTRACT FOR THE SALE OF LAND

BY the general rule in the United States a purchaser acquires equitable title to land immediately on entering into a valid executory land contract.¹ Certain consequences respecting his rights flow from the application of such a rule; for example, it is generally held that the purchaser bears the risk of loss from destruction

⁴² Dissenting in *Alexander v. Hagedorn*, ———Tex.———, 226 S. W. 2d 996, 1003 (1950).

¹ *Junkin v. McClain*, 221 Iowa 1084, 265 N. W. 362 (1936); *Barker v. Klinger*, 302 Mich. 282, 4 N. W. 2d 596 (1942); *Petition of S. R. A., Inc.*, 219 Minn. 493, 18 N. W. 2d 442 (1945), *aff'd*, 327 U. S. 558 (1946); *Savings Trust Co. of St. Louis v. Skain*, 345 Mo. 46, 131 S. W. 2d 566 (1939).

of the property or decrease in its value and benefits from any increase in value.² However, the wording of several Texas cases and the actual holdings of a few have been said to cast a doubt upon the existence of such a rule so far as this jurisdiction is concerned.

In *Johnson v. Wood*,³ decided in 1941, the Texas Commission of Appeals, in an opinion adopted by the Texas Supreme Court, held that where the full purchase price had been paid, the equitable title passed to the vendee and Article 5531⁴ of the *Texas Revised Civil Statutes* (Vernon, 1948) which bars the bringing of an action for specific performance of a land contract after the lapse of four years, was not applicable. The court stated that the vendee should prevail since his suit was for the *recovery* of land and, therefore, fell within the orbit of Article 5529⁵ of the *Revised Statutes*, which expressly omits provision for a limitation period for the *recovery* of real estate. While the holding was not inconsistent with the general rule, certain language in the opinion did cast doubt upon its application in Texas. The court expressed itself in the following language:⁶

"So long as Johnson had not performed his covenants by the payment of the purchase price, he had but an *equitable* right, but upon his performance that right ripened into an *equitable title* superior to that of Wood. An equitable title, as distinguished from a mere equitable right, will support an action of trespass to try title."

As a consequence the decision has been interpreted to mean that in Texas a mere equitable right will not support an action for specific performance and further that the rights and liabilities of the vendee under an executory land contract are entirely different

² *Davidson v. Hawkeye Ins. Co.*, 71 Iowa 532, 32 N. W. 514 (1887); *McGinley v. Forrest*, 107 Neb. 309, 186 N. W. 74 (1921).

³ 138 Tex. 106, 157 S. W. 2d 146, *rev'g* 137 S. W. 2d 202 (Tex. Civ. App. 1940).

⁴ The statute declares: "Any action for performance of a contract for the conveyance of real estate shall be commenced within four years next after the cause of action shall have accrued, and not thereafter."

⁵ "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward."

⁶ 138 Tex. at 110, 157 S. W. 2d at 148. Emphasis added. This language appears verbatim in *Pickle v. Whitaker*, 224 S. W. 2d 741 (Tex. Civ. App. 1949) *er. ref.*

from those existing in other jurisdictions. It is submitted, however, that the distinction between an equitable right and an equitable title is merely one of terminology and that except for the situations involving the action of trespass to try title and the resulting application of Article 5529, the substantive effect of the rule in Texas is no different from the rule followed elsewhere.

Although the court in *Johnson v. Wood*, and in subsequent cases containing language preserving the distinction between equitable title and equitable right, did not discuss the matter, there are early Texas Supreme Court cases which might be advanced as authority for such a distinction between equitable right and equitable title. Early in Texas statehood, in *Browning v. Estes*,⁷ decided in 1848, the court held that a purchaser of land under a land contract could not resist his vendor's action for possession while the purchase price remained unpaid. In 1849, in *Hemming v. Zimmerschitte*,⁸ the court in considering an action for specific performance of a land contract held that where a purchaser had fully performed *by paying the purchase price*, "He was from that time fully clothed with equitable title and had a perfect right at any time to have demanded the conveyance of the interest remaining in the vendor."⁹ Following these two decisions, the supreme court in *Neil v. Keese*,¹⁰ in 1849, held a defendant's equitable title to be a valid defense to a suit in trespass to try title. Two years later, in 1851, the same court held that equitable title was sufficient title to enable the plaintiff to prevail in an action of trespass to try title.¹¹ In order for the four decisions noted to be reconciled, the distinguishing factor would seem to lie in the payment or non-payment of the purchase price since, as indicated above, equitable title is both a good defense to and a sufficient basis for maintaining a suit in trespass to try title. Further, it appears that unless the purchase price has been paid, the vendee will lose in a suit of this nature

⁷ 3 Tex. 462.

⁸ 4 Tex. 159.

⁹ *Id.* at 166.

¹⁰ 5 Tex. 23.

¹¹ *Easterling v. Blythe*, 7 Tex. 210.

and that where the full purchase has been paid the vendee becomes the owner of the equitable title from the time of such payment.

While it is possible that the court actually intended through these decisions to hold that payment of the purchase price is a necessary prerequisite to the passage of equitable title for all purposes, no reasons or authority were cited by the court. It might be urged that the law of Spain influenced the court; the Spanish rule is expressed as follows in *Las Siete Partidas*:¹²

"The ownership of property which is sold does not pass to the party who is given possession of the same until he has paid for it.

"Men obtain possession of the property of others through sales or gifts by way of dowry, or in other ways, or by exchange, or for some other lawful reason; wherefore we decree that the ownership of property passes to the party who obtains possession of it by grants of this kind by one man to another or by his order. If, however, the party who sold his property to another gives him possession of it, and the purchaser has not paid the price, or given a surety or pledges or appointed a time for payment, the mere giving of possession in this way does not transfer the ownership of the property until the purchase price has been paid. But if the party has given a surety or pledges, or appointed a time for payment, or where the vendor trusts the purchaser for the price, then the ownership of said property shall vest in him by the mere act of giving possession, and even though the price has not been paid, he is, nevertheless, bound to pay it."¹³ (Emphasis added.)

However, there are Texas cases containing language expressly stating that equitable title vests *eo instanti* the binding land con-

¹² LAS SIETE PARTIDAS (Scott's English Translation, 1931) Part. 3, L. XLVI.

¹³ It is noteworthy, in a consideration of the Spanish rule, that equity as known to the jurisdictions of the common law is not a part of the legal system of Louisiana, whose jurisprudence is founded upon the civil law. See Howe, *Roman and Civil Law in America*, 16 Harv. L. Rev. 342 (1903).

The Supreme Court of Louisiana has held that no title passes to the vendee on signing of a contract for the sale of land, *Peck v. Bemiss*, 10 La. Ann. 160 (1885), and that the risks of ownership remain on the vendor, *McDonald v. Aubert*, 17 La. 448 (1841).

Payment of the purchase price in Louisiana gives right to claim delivery of the *res*; which is analogous to the Texas right of specific performance, but does not transfer any title or risks of ownership. *Page v. Loeffler*, 146 La. 890, 84 So. 194 (1920).

tract is entered into,¹⁴ thereby refuting any implication that the Spanish law controls. In addition, there are Texas holdings to the effect that the vendee has the right to the increments of the land¹⁵ and that he must pay taxes¹⁶ and paving liens.¹⁷ These consequences are entirely consistent with the general rule. Moreover, a comparison of the specific performance cases in Texas with those in other jurisdictions particularly serves to illustrate that the vendee's equitable interest is the same. Where the full purchase price has been paid in other jurisdictions, the vendee has equitable title as he does in Texas.¹⁸ The only difference in that situation is that in other states the remedy of the vendee is specific performance because of the requirement of legal title as a prerequisite to bringing the action of ejectment, while in Texas the vendee can bring trespass to try title. In both instances the vendee is entitled to the land. In the situation where the vendee has tendered the purchase price but the vendor has refused it, other jurisdictions allow specific performance and Texas is in accord.¹⁹ The only distinction lies in the effect of the statutes of limitation, which vary according to the jurisdiction being considered.

In the situation where the vendee has not tendered the purchase price, although equitable title is said to pass in other states, specific performance will be denied unless there is a tender²⁰ or compliance

¹⁴ *Leeson v. City of Houston*, 243 S. W. 485 (Tex. Comm. App. 1922), *opinion adopted by the Supreme Court*; *Fed. Life Ins. Co. v. Martin*, 157 S. W. 2d 149 (Tex. Civ. App. 1941) *er. ref.*; *Alworth v. Ellison*, 27 S. W. 2d 639 (Tex. Civ. App. 1930) *er. ref.*

¹⁵ *Rives v. James*, 3 S. W. 2d 932 (Tex. Civ. App. 1925) *er. ref.*

¹⁶ *Ingraham v. Central Bitulithic Co.*, 51 S. W. 2d 1067 (Tex. Civ. App. 1932) *er. ref.*; *Alworth v. Ellison*, 27 S. W. 2d 639 (Tex. Civ. App. 1930) *er. ref.*

¹⁷ *Ingraham v. Central Bitulithic Co.*, 51 S. W. 2d 1067 (Tex. Civ. App. 1932) *er. ref.*

¹⁸ Since the vendee in other jurisdictions has equitable title prior to payment of the purchase price, he has it *a fortiori* after payment of the purchase price.

¹⁹ *Babcock v. Lewis*, 113 S. W. 584 (Tex. Civ. App. 1908) *er. ref.*; *Roberts v. Mayer*, 191 Ga. 588, 13 S. E. 2d 382 (1941); *Daven v. Downey*, 378 Ill. 543, 39 N. E. 2d 45 (1944); *Utterback v. Stewart*, 224 Iowa 1135, 277 N. W. 735 (1938).

²⁰ *McPherson v. Johnson*, 69 Tex. 484, 6 S. W. 798 (1888); *Haldeman v. Chambers*, 19 Tex. 1 (1857); *Jones v. Akins*, 281 S. W. 299 (Tex. Civ. App. 1926) *er. disp'd*; *Ross v. Blunt*, 166 S. W. 913 (Tex. Civ. App. 1914) *er. ref.*; *Carpenter v. Shannon Bros.*, 199 Ark. 449, 134 S. W. 2d 6 (1940); *Boro v. Beaulieu*, 20 Cal. 2d 849, 122 P. 2d 517,

with the requirements stated by Justice Cardozo in *Epstein v. Gluckin*:²¹ "What equity exacts as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to the plaintiff or to the defendant." The result in Texas appears to be substantially the same, for no Texas case has been found which will permit specific performance of a land contract solely on the basis of the equitable right of the vendee unless the defendant vendor is fully protected by the payment of the purchase price. On the contrary, several Texas decisions require the vendee to tender the balance of the purchase price into court²² or make the decree of specific performance conditional upon payment of the purchase price,²³ thus complying with the requirement of *Epstein v. Gluckin*.

While there is a possibility, in view of the earlier Texas decisions, *supra*, that the passage of equitable title depends on whether or not the purchase money has been paid, it is more probable that the decisions in *Johnson v. Wood* and in other cases containing similar language are merely a rationalization adopted in order to avoid the effect of the statute of limitations. Under the rationalization the courts permit a vendee to bring an action for legal title after the same would have been barred by a strict interpretation of the statute of limitations as it applies to specific performance of a contract for the conveyance of land under Article 5531. Apparently it has been reasoned that if the vendee can be brought within the operation of the express omission in Article 5529, then the party actually entitled to the property will prevail. The statute of limitations was set up as a defense in all of the cases in which the language of *Johnson v. Wood* appears.²⁴

129 P. 2d 345 (1943); *White v. Cohn*, 137 Fla. 501, 188 So. 581 (1939); *Gilleland v. Welch*, 199 Ga. 341, 34 S. E. 2d 517 (1945).

²¹ 233 N. Y. 490, 135 N. E. 861, 862 (1922).

²² *Polk v. Kyser*, 53 S. W. 87 (Tex. Civ. App. 1899); *Hunter v. Clayton*, 36 S. W. 326 (Tex. Civ. App. 1896).

²³ *Kalklosh v. Haney*, 23 S. W. 420 (Tex. Civ. App. 1893).

²⁴ *Secrest v. Jones*, 21 Tex. 121 (1858); *Ft. Quitman Land Co. v. Mier*, 211 S. W. 2d 340 (Tex. Civ. App. 1950); *MacDonald v. Follet*, 180 S. W. 2d 334 (Tex. Civ. App. 1944).