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Real Property

J. J. Kilgariff

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other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.”

In *Portland Gasoline Co. v. Superior Marketing Co.*¹⁹ a contract requiring one of the parties to market through the other all of the output of propane-butane gas from its Pampa, Texas, plant was held not to violate this Act. The court reasoned that the contract covered only the Pampa plant and left the producer free to bargain with other marketing agencies for production from its other plants. The reasoning of the decision follows *Cox, Inc. v. Humble Oil & Refining Co.*²⁰ and *Great A. & P. Tea Co. v. Jones Investment Co.*²¹ Where exclusive selling agreements cover only a place of production or of use, and not the contracting parties themselves, the contract will not be found to violate the Act.

William Johnson Davis.

REAL PROPERTY

TENANCY BY ENTIRETY—CONVEYANCE BY HUSBAND TO HIMSELF AND WIFE

Arkansas. In *Ebrite v. Brookhyser*¹ a husband conveyed land from himself to his wife and himself as tenants by the entirety. A tenancy by entirety is essentially a form of joint tenancy, modified by the common law theory that the husband and wife are one person. Thus, it resembles a joint tenancy in its incident of survivorship. It differs from joint tenancy in that neither the husband nor the wife can partition or alienate an interest in the property without the consent of the other. Essential to the creation of the estate at common law are the four unities of interest, time, title, and possession.²

¹⁹Tex....., 243 S. W. 2d 823 (1951).

²⁰ 16 S. W. 2d 285 (Tex. Comm. App. 1929).

²¹ 65 S. W. 2d 495 (Tex. Comm. App. 1933).

¹Ark....., 244 S.W. 2d 625 (1951).

² 26 AM. JUR., *Husband and Wife*, § 66.

When the husband died intestate, his brother and sister brought suit to set aside the deed on the grounds that an estate by entirety could not be created except when the title came to the husband and wife by deed from a third person and that the essential unity of time was lacking since the wife did not acquire her interest at the same time as the half interest retained by her husband. In deciding the first contention the Arkansas Supreme Court was called upon to determine whether a statute³ providing that a deed executed by a married man directly to his wife shall be construed as conveying "the interest specified in the deed" was applicable.

The court upheld the conveyance for the following reasons: (1) the statute permits a husband to create a tenancy by the entirety by a conveyance to himself and his wife, and (2) the unity of time was not lacking because the husband conveyed not to himself, but to a legal entity composed of husband and wife. The Arkansas Supreme Court thus aligned itself with the modern view that a conveyance intended to create a tenancy by entirety will be upheld even though some of the technical requirements for the creation of that estate are lacking.

This modern view of allowing the parties to do directly what they could undoubtedly do indirectly through the device of a straw man appears to be logical and just. It gives each spouse absolute freedom in dealing with separately owned property, and this freedom entails no interruption of the unity arising from marriage. For the court to construe the conveyance otherwise would be a judicial conveyance of the property contrary to the owner's expressed intention.⁴

ASSIGNMENT VERSUS SUBLEASE

Arkansas. In *Jaber v. Miller*⁵ Jaber rented a building for a five-year term with a provision that the lease would terminate if the

³ ARK. STAT. 1947 ANN. § 50-413.

⁴ 2 TIFFANY, REAL PROPERTY (3d ed. 1939) § 432.

⁵Ark....., 239 S. W. 2d 760 (1951).

premises were destroyed by fire. Later the lease was transferred for the remainder of the term by mesne conveyances to Miller by an instrument of transfer entitled "Contract and Assignment", which did not contain a provision governing the rights of the parties in case the building was destroyed by fire. Miller executed a series of notes to divide payment into monthly installments and also agreed to pay the owners of the property the stipulated rental. Jaber reserved the right to retake possession if Miller failed to pay the rent or the notes. When the premises burned, Miller brought suit for the cancellation of his notes for the monthly installments, and the Arkansas Supreme Court was faced with the question whether the instrument of transfer from Jaber to Miller was an assignment or a sublease. The important practical difference is that a sublessee is not considered the legal equivalent of an assignee and is neither bound by nor entitled to enforce, the covenants and conditions in the head lease.⁶

In holding that the transfer was an assignment, the Arkansas Supreme Court, in order to avoid the harsh results of the traditional common law view, adopted the principle that the intention of the parties is to govern in determining whether an instrument is an assignment or a sublease.

The majority of the American jurisdictions follow the simple common law view: if the instrument purports to transfer the lessee's estate for the entire remainder of the term, it is an assignment, regardless of its form or of the parties' intention. Conversely, if the instrument purports to transfer the lessee's estate for less than the entire term—even for a day less—it is a sublease, regardless of its form or of the parties' intention.⁷ The Arkansas court felt that this common law doctrine was supportable for a lawyer trained in common law technicalities but refused to follow it because for the less skilled lawyer or for the layman it is

⁶ 1 TIFFANY, REAL PROPERTY (3d ed. 1939) § 124.

⁷ Ferrier, *Can There be a Sublease for the Entire Unexpired Portion of a Term?* 18 Calif. L. Rev. 1 (1929).

a trap that leads to injustice by thwarting the result sought by the parties.

Arkansas also refused to align itself with the minority of American courts,⁸ including Texas,⁹ which have gone as far as possible, in order to soften the harshness of the common law rule, to find something that might be said to constitute a reversion where the parties intended a sublease. These jurisdictions hold that if the sublessor reserves a right of re-entry for non-payment of rent, this is a sufficient reversionary estate to make the instrument a sublease. Although this view is based on the erroneous theory that such a right of re-entry is a reversionary interest whereas at common law a right of re-entry was a mere chose in action, the commendable feature of these decisions lies in their effort to find some basis for effectuating the parties' intention.

The Arkansas view seems the most rational, for there seems to be nothing in legal theory to justify the requirement that a sublease should be of less duration than the head lease. Since the fundamental distinction between assignment and sublease should be recognized, the category into which a particular transfer is to be placed should depend not upon the existence of a technical reversion in point of time but upon the intention of the parties to the transfer.¹⁰

ADVERSE POSSESSION — PROOF OF HOSTILE CLAIM

*Texas. Gilbert v. Green*¹¹ was an action in trespass to try title to regain possession under a record title. Plaintiff's predecessor in title, Gilbert, and defendant's predecessor in title, Parsons, came into possession through a family partition of adjoining unfenced tracts of land. Gilbert fenced in his cattle in such a way as to permit Parson's cattle to graze over a portion of Gilbert's land; that portion was the tract in dispute. Parsons neither cultivated nor

⁸ Massachusetts, Montana, and California.

⁹ *Davis v. Vidal*, 105 Tex. 444, 151 S.W. 290 (1912).

¹⁰ *Ferrier, op. cit. supra* note 7 at 19.

¹¹Tex....., 242 S. W. 2d 879 (1951).

made improvements on such portion. The description in the deed to defendant included only the land Parsons had under record title, but defendant purchased under the impression that he was acquiring the land in dispute; and Parsons did nothing to correct this impression. The defendant claimed the tract by adverse possession under the ten-year statute of limitation by reason of Parsons' use of the land for more than ten years.

In Texas, in order to constitute adverse possession which results in obtaining title to real property, the possession must be actual, visible, continuous, and hostile.¹² Here the controlling question faced by the Texas Supreme Court was whether Parsons asserted an adverse and hostile claim of ownership against Gilbert while using the land in dispute. Parsons testified he had never asserted such a claim, although he had used the land for more than ten years. Defendant contended this use raised a presumption of hostile and adverse possession.

Generally, where title to real property is in issue, present possession alone is prima facie evidence of the possessor's ownership, the presumption merely shifting to the opponent the burden of producing evidence to the contrary.¹³ The Texas Supreme Court admitted that possession under the ten-year statute has been held to raise a presumption that it was adverse and hostile in the absence of evidence to the contrary qualifying and explaining the possession, but said the proof establishing the possession must itself be consistent with a hostile claim of ownership in order to support such a presumption.¹⁴ The court said that allowing possession under the limitation statutes to create a presumption of ownership is deceptive, since the adverse possessor has the burden of offering proof of a hostile claim, and it is better to say that the same evidence can be used to prove both possession and a hostile claim of ownership if the evidence is susceptible of such treatment.

The court sustained the plaintiff's claim for the following rea-

¹² TEX. REV. CIV. STAT. (Vernon, 1948) art. 5515.

¹³ MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937) § 69.

¹⁴ Hartman v. Huntington, 11 Tex. Civ. App. 130, 32 S. W. 562 (1895).