



1955

## Real and Personal Property

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### Recommended Citation

R. W. Hemingway, *Real and Personal Property*, 9 Sw L.J. 227 (1955)  
<https://scholar.smu.edu/smulr/vol9/iss2/11>

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## REAL AND PERSONAL PROPERTY

## ADVERSE POSSESSION

THE most noteworthy case in the field was *Orsborn v. Deep Rock Oil Co.*<sup>1</sup> It involved a suit for title, by the adverse possessor, under the ten-year statute of limitations,<sup>2</sup> against the record owners, to a 56-acre tract of land. This tract was the southernmost tract of three tracts of land which comprised some 747 acres all enclosed by fence or natural water boundaries. Plaintiff's father had obtained title to 800.5 acres in three deeds, and was under the erroneous impression that the 747 acres enclosed by fence had been conveyed by these deeds. Actually he had acquired title only to the northerly 630 acres. The middle tract of 60 acres was still in the sovereignty of the soil, also unknown to the plaintiff's father.

Plaintiff's father had entered the enclosed tract in 1919 and remained in possession until his death in 1933, whereupon plaintiff succeeded to the possession and remained thereon, without dispute, until 1952 when he brought this suit. The topography of the land was fairly barren with some rough growth and grass. No improvements were ever erected on the disputed tract and the nearest watering tank was about a mile or so to the north. It was never under cultivation, nor did plaintiff or his father ever pay taxes on the disputed land. However, at all times from 1919 on, a minimum of 30 head of cattle were grazed within the enclosure, and there was testimony to the effect that they could be seen at frequent intervals on the disputed tract, and at least every two weeks plaintiff's men could be seen on horseback within the disputed tract.

The Texas Supreme Court affirmed the holding of the Texas Court of Civil Appeals,<sup>3</sup> which had reversed the judgment of the trial court, and held that the facts were insufficient to establish adverse possession in the plaintiff, as a matter of law. The theory of the majority of the court was that when one holds in reference

<sup>1</sup> .....Tex., 267 S.W. 2d 781 (1954).

<sup>2</sup> Tex. Rev. Civ. Stat. (Vernon 1948) Arts. 5510, 5514, 5515.

<sup>3</sup> 259 S.W. 2d 625 (Tex. Civ. App. 1953).

to deeds there must be actual possession of the additional land of such character as to give notice of exclusive adverse possession of such additional land; that the grazing of unenclosed lands was insufficient to establish adverse possession;<sup>4</sup> and that as plaintiff's father had not constructed the fences they had "no more effect than if same had never come into existence,"<sup>5</sup> hence grazing of such lands constituted no more than grazing unenclosed lands.

The minority of the court was of the opinion that plaintiff had established possession and adverse user to satisfy the statute of adverse possession and noted that the statutory requirements to "cultivate, use, or enjoy"<sup>6</sup> are alternative and not cumulative; and to satisfy this requirement all that is required is that a use be adopted that is suitable and reasonable for the land,<sup>7</sup> so that the true owner would have notice of invasion of his possession by the adverse possessor.

It is submitted that the majority is being unnecessarily technical in characterizing the possession of the plaintiff as non-adverse in this case; that perhaps when *Vineyard v. Brundrett*,<sup>8</sup> relied on by the majority, was decided in 1897, because of conditions of travel and communications, it was then necessary to have a stronger showing of elements of adverse possession than exists at the present time.

It is the writer's view that all that should be required to characterize possession as adverse is that the use be in a manner reasonably calculated to give notice to a true owner who is non-negligent in observing the condition of his land. In this case if the true owner had been observant, it is reasonably probable that he would have noticed evidences of an invasion of his possession such as would put a reasonably prudent man on inquiry as to the intent of the possessor. Here the plaintiff had possessed the land in the only reasonably possible manner, considering the topography and uses to which the land may be utilized.

The case seems to indicate a strict interpretation of facts consti-

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<sup>4</sup> *Fuentes v. McDonald*, 85 Tex. 132, 20 S.W. 43 (1892).

<sup>5</sup> *Vineyard v. Brundrett*, 42 S.W. 232 (Tex. Civ. App. 1897) *error ref.*

<sup>6</sup> Tex. Rev. Civ. Stat. (Vernon 1948) Art. 5510.

<sup>7</sup> *Nona Mills Co. v. Wright*, 101 Tex. 14, 102 S.W. 1118 (1907).

<sup>8</sup> Note 5, *supra*.

tuting adverse possession, where such facts are near the border line; however, in view of the long and undisputed possession of the plaintiffs it is submitted that a more liberal attitude would have come closer to establishing justice between the parties.

### CHATTEL MORTGAGES

In the case of *Cloud Ash Flooring Co. v. J. A. Riggs Tractor Co.*<sup>9</sup> the Arkansas Supreme Court answered in the affirmative the question of whether a conditional seller could provide in the chattel mortgage that the lien created thereby would be extended to the costs of repairs and maintenance rendered by the conditional seller upon such encumbered chattel.

The contract of sale provided that the buyer would make the necessary repairs on the equipment, and in default of the buyer to do so the seller could make such repairs and ". . . all moneys advanced or paid by seller in so doing shall be added to and be deemed a part of the balance due hereunder and bear interest at a like rate."

The seller made repairs to the tractor, charging the costs of the parts and labor to the conditional buyer on open account. The non-payment of these items formed the gravamen for seller's enforcing the retained title against the mortgagee of the conditional buyer.

There have been three cases in the state on this question.<sup>10</sup> In *Fassit v. Waldo*<sup>11</sup> and *Augusta Cooperage Co. v. Parkham*<sup>12</sup> the question was not squarely presented, and, although *Hammans Lumber Co. v. Fricker*<sup>13</sup> approved the extension of the lien to subsequent repairs, the court stated that it was defective as a precedent since not reported in full. Although the Uniform Sales Act is in force in Arkansas, it does not apply, conditional sales being expressly excepted from its operation.<sup>14</sup>

<sup>9</sup> Ark., 266 S.W. 2d 284 (1954).

<sup>10</sup> *Hammans Lumber Co. v. Fricker*, 184 Ark. 1193, 42 S.W. 2d 1001 (1931); *Augusta Cooperage Co. v. Parkham*, 139 Ark. 605, 213 S.W. 737 (1919); *Fassit v. Waldo*, 57 Ark. 270, 21 S.W. 436 (1893).

<sup>11</sup> Note 10, *supra*.

<sup>12</sup> Note 10, *supra*.

<sup>13</sup> Note 10, *supra*.

<sup>14</sup> Ark. Stat. 1947 Ann., Section 68-1479.

The dissent disagreed with the necessity for the doctrine and cited statutes<sup>15</sup> under which the lien could have been otherwise perfected, stating that there should be no extension of the inherent vice of secret liens.

It would seem that the minority is unduly worried as to the extension of the doctrine to the point of allowing "secret liens," for, although the majority expressly declined to express itself on this point, the case was one where the mortgagee had full knowledge of the lien and of the extent thereof. From the tone of the opinion it is hard to determine whether the case will be extended beyond situations where the written instrument must be recorded by law, as in this case; however, if the conditional seller could prove actual or constructive notice to the subsequent lienor there would be no harm in extending the doctrine at least to this extent.

#### DEEDS

As might be expected, the cases construing deeds and their effect constituted one of the most prolific areas of decision in the real property field. Most of the points raised have been well settled; however, in Texas the trend to strictness in deed descriptions<sup>16</sup> has been confirmed.

The case of *Tidwell v. Chesier*<sup>17</sup> construed the sufficiency of a description in a contract of sale, where the contract was fully executed, a deed having been executed bearing the same description as that shown in the contract of sale. The description set forth the property as being situated in Ellis County, in two tracts of land, out of three surveys. The court held that the agent could not recover on the contract of sale as the description "failed to furnish *within itself*, or by reference to some other existing *writing*, the means or data by which the particular land may be identified with reasonable certainty."<sup>18</sup>

The next case decided was that of *Miers v. Housing Authority*

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<sup>15</sup> Ark. Stat. 1947 Ann., Sections 51-404, 51-405, 51-409, 51-412.

<sup>16</sup> *Broadus v. Grout*, 152 Tex. 389, 258 S.W. 2d 308 (1953), comment 8 Sw.L.J. 193.

<sup>17</sup> \_\_\_\_Tex.\_\_\_\_, 265 S.W. 2d 568 (1954).

<sup>18</sup> *Id.* at p. 569, emphasis added.

of the City of Dallas<sup>19</sup> where the "statement in writing" by which the condemnation proceeding was begun<sup>20</sup> described the property as being "... lots 1 and 2, Block 8 of Bonita Plaza Addition... and all adjoining and contiguous property owned or claimed. . . ."<sup>21</sup> In upholding the description, the court said that it was analogous to one describing all the land owned in a state or county. However, the court commented that, although our rules, which require identification of the land "either by the instrument in question or some *equally certain* extrinsic matter to which the instrument gives the *key*,"<sup>22</sup> seem to require a more certain identification than this, the decisions "have sustained this type of description beyond any possibility of rejecting them now."<sup>23</sup>

Following the above two Texas Supreme Court cases, there were two cases in the Texas Courts of Civil Appeals that throw further light on the type of "key" that must be furnished by the deed. The first is the case of *Wilson v. Meredith, Clegg, & Hunt*,<sup>24</sup> where a deed description referring to a former deed, which contained a sufficient description, furnished a proper "key." The second case is that of *Texas Consolidated Oils v. Bartels*,<sup>25</sup> which approved a description conveying all the oil and gas leases anywhere within the United States, "... any of which are located within the states . . . of Texas."<sup>26</sup> The court declared that it had long been the rule of this state that a deed purporting to convey all the land owned by the grantor in the state or in a named county is sufficient to effect a conveyance.

Rounding out the point, the latest expression comes from the very recent Texas Supreme Court case of *Rowson v. Rowson*,<sup>27</sup> which also concerned a suit on a contract of sale, this being for a cottage located on Lake Dallas in Denton County. The contract was formed by a passage of letters. The letter forming the basis

<sup>19</sup> \_\_\_\_ Tex. \_\_\_\_, 266 S.W. 842 (1954).

<sup>20</sup> Tex. Rev. Civ. Stat. (Vernon 1948) Art. 3264.

<sup>21</sup> Note 19 at p. 843, *supra*, emphasis added.

<sup>22</sup> Note 19 at 844, *supra*, emphasis added.

<sup>23</sup> *Alexander v. Byrd*, 114 S.W. 2d 915 (Tex. Civ. App. 1938), *error ref.*; *Sun Oil Co. v. Burns*, 125 Tex. 549, 84 S.W. 2d 442 (1935); *Sun Oil Co. v. Bennett*, 125 Tex. 540, 84 S.W. 2d 447 (1935).

<sup>24</sup> 268 S.W. 2d 511 (Tex. Civ. App. 1954) *error ref.*, *n.r.e.*

<sup>25</sup> 270 S.W. 2d 708 (Tex. Civ. App. 1954), *error ref.*, 9 Sw.L.J. 125.

<sup>26</sup> *Id.* at p. 710.

<sup>27</sup> 24 Tex. Sup. Ct. Rep. 197 (Feb. 1955).

for this action was one written from the seller, in Dallas, to the buyer, then living in the cottage on Lake Dallas. The letter had a Texas dateline, a Dallas address was shown on the letterhead, the cottage was referred to by the writer as "my cottage," and directed the buyer that the writer was about to notify the Lake Dallas Telephone Company to remove the phone in the cottage, and stated that the buyer's "best bet would be to leave Dallas."

In holding the contract invalid and unenforceable, the court stated that the letter raised conflicting presumptions as to whether the cottage was located in Dallas or in Denton County. The court continued that it is immaterial that the Denton County property was "*in the contemplation of the parties* at the time the letters were written, or even that parole evidence leads the court to believe that the Denton County property was the subject matter of the contract, *unless the description leads to that conclusion with reasonable certainty, the contract is unenforceable.*"<sup>28</sup>

Where, then, are we now? It is writer's view that the following principles are emerging from the cases:

1. The policy of the court has shifted from one of effectuating the intentions of the parties to one of holding the deed description insufficient if a third party would not be put on notice, as was first indicated in the case of *Broadus v. Grout*.<sup>29</sup> This trend has been commented on by a writer previously,<sup>30</sup> and now seems confirmed by statements in the *Rowson* case, for there the court admitted that the intention *inter se* was known by the court and it seems sufficient evidence existed in the case to uphold a judgment enforcing the contract, if so desired by the court.
2. The policy of the *Broadus* case will be applied to contracts of sale, as well as to deeds, as shown by the *Tidwell* case, and the *Rowson* case. This should be a *caveat* to those whose business involves the incidental drawing of instruments, such as contracts of sale, to seek competent legal advice.
3. The deed must describe the land with sufficient particularity to locate the *situs* of the land, *situs* here meaning the general location on the ground. If the deed description is not sufficient in itself, then it must incorporate a written document so that when it is construed with the

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<sup>28</sup> *Id.* at p. 199.

<sup>29</sup> Note 16, *supra*.

<sup>30</sup> Comment, 8 Sw.L.J. 193 (1954).

deed the *situs* of the land may be located. This would seem to be a fair conclusion to draw from the *Tidwell* and *Wilson* cases.

4. The *Miers* and *Texas Consolidated Oils* cases, the latter citing *Sanderson v. Sanderson*<sup>31</sup> and *Pickett v. Bishop*<sup>32</sup> indicate that if the *situs* is located anywhere within a definite area, or contiguous to a definitely located parcel of land, the description is sufficient. However, to be sufficient it must include *all* the land owned within the area or be *all* the land contiguous to the definitely known tract, the theory being that the third party can be appraised of dealings in such land, since he can define the area.
5. Deeds that have heretofore been held good having descriptions referable to a particular site such as "my Lake Dallas Cottage," or identified by a well-known term as "the old mill tract" must be assigned to the limbo until the court passes on their validity. For under the new doctrine it would not be possible to locate the *situs* without reference to unwritten extrinsic evidence, unless such evidence would come under the cryptic phrase "equally certain extrinsic matter" such as is stated in the *Miers* case. Some language in the *Rowson* case indicates if the letter had referred to the cottage as "my Lake Dallas cottage" instead of "my cottage" it would have been sufficient. However, this is mere dicta, and, since the *Broaddus* case, anything less than a direct holding should be eyed dubiously.

Passing from Texas cases to those of Oklahoma, the case of *Little v. Echols*<sup>33</sup> presented an excellent discussion on the issue of whether passing of physical possession without more, constitutes a valid delivery. The case involved the exchange of deeds by husband and wife where the deed to the husband was not filed for record until after the wife's death.

The majority of the court held that not only was it necessary for actual possession to pass but that there also must be the requisite present intent to pass title, which intent may be determined from all the surrounding circumstances of the case. Testimony as to the manifestation of the intent was meager; however, the majority held that the intent manifested was not one to pass a present title, but rather an intent that the deed constitute a testamentary disposition. This was derived from testimony that H had stated that he was looking after W's property because of her health, that nothing was said about existence of the unrecorded deed until

<sup>31</sup> 130 Tex. 264, 109 S.W. 2d 744 (1937).

<sup>32</sup> 148 Tex. 207, 223 S.W. 2d 222 (1949).

<sup>33</sup> .....Okla....., 269 P. 2d 984 (1954).

after her death, and that H had previously brought suit against third parties to protect the land, but had brought the suit in W's name. As there was no requisite intent the deed was void for failure of delivery during the grantor's lifetime.

The dissent contended that passage of physical possession was delivery *per se* and conclusive as to the issue, and also that the extrinsic acts and statements have no part in determining whether the delivery was effective.

The majority is clearly right. Although parol evidence is not admissible to show the character of an instrument as a deed or testamentary disposition when the instrument is clear on its face,<sup>34</sup> it is the general rule,<sup>35</sup> the rule in Oklahoma,<sup>36</sup> and the rule in Texas,<sup>37</sup> that parol evidence is admissible to show whether there has been a valid delivery, as such fact does not appear on the face of the deed, and that if parol evidence shows mere passage of physical possession without more, there is no delivery. This is not to say that every passage of possession without a formal statement to show the intent is necessarily invalid, for the requisite intent may be inferred from the surrounding circumstances.<sup>38</sup>

#### FINDING LOST OR MISPLACED GOODS

The case of *Couch v. Schley*,<sup>39</sup> a Texas Civil Appeals case, presents a case of first impression in this state on the subject of finding treasure trove. The treasure trove consisted of \$1,000.00 in currency in a glass jar found buried by a workman digging in the dirt floor of an old garage while preparing to put in a new floor. The issue presented was whether the money so found belonged to the owner of the *locus in quo*, or the workman who found it.

The owner of the *locus in quo* contended that the property was not lost but had been misplaced and as such should be awarded to him. The court rejected the distinction between lost and mis-

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<sup>34</sup> *Wilenou v. Handlin*, 207 Ill. 104, 69 N.E. 892 (1904).

<sup>35</sup> *Selby v. Smith*, 301 Ill. 554, 134 N.E. 109 (1922).

<sup>36</sup> *Hull v. Dollarhide*, 116 Okla. 180, 244 Pac. 813 (1925).

<sup>37</sup> *Bibby v. Bibby*, 114 S.W. 284 (Tex. Civ. App. 1938) *error disp.*

<sup>38</sup> Notes 35, 36, 37, *supra*.

<sup>39</sup> 272 S.W. 2d 171 (Tex. Civ. App. 1954) *error ref.*

placed articles as applying to treasure trove, stating that the distinction only applied in the old English law where casually lost, abandoned, or misplaced property was awarded to the finder, and all hidden property was awarded to the King, under the King's prerogative, and as the State has never claimed such a right the distinction was invalid in Texas.

The court reviewed English<sup>40</sup> and American<sup>41</sup> precedents and concluded that there had been no case in England or the United States where the owner of the *locus in quo* had prevailed over the finder of treasure trove. The test stated by the court is:

... where money is found while it was hidden or secreted in the earth under such circumstances as to indicate that it had been so hidden or secreted for a considerable period of time, that the true owner thereof was unknown, and that in reasonable probability he has either died without revealing his secret to anyone or had abandoned the buried treasure, the finder will prevail.<sup>42</sup>

The case is in line with the general authority in the United States; however, as the law of treasure trove is said to generally be merged with the law of finding lost goods<sup>43</sup> it can be seen from the test applied above, the court conceptually dispenses with the distinction between misplaced and lost goods. It is submitted that in the above test the court is actually applying the same test as that underlying the mislaid — lost goods rationale, and is doing it without resort to the artificial and technical distinctions usually applied by cases in this field as to what constitutes a "mislaid" chattel.

The policy set forth is to award the chattels to the one most likely to be in a position to return the chattels to the true owner, unless it can be shown that the probability the true owner will return to claim the chattel is too remote to be a consideration.

#### WATER AND WATER COURSES

*California Co. v. Price*<sup>44</sup> was a hard-fought case of some importance in Louisiana concerning the ownership of land bottoming

<sup>40</sup> *Armory v. Delamin*, 1 Str. 505 (1722).

<sup>41</sup> *Danielson v. Roberts*, 44 Or. 108, 74 Pac. 913 (1904); *Weeks v. Hackett*, 104 Me. 264, 71 Atl. 858 (1908).

<sup>42</sup> Note 63 at p. 176, *supra*.

<sup>43</sup> *Weeks v. Hackett*, 104 Me. 264, 71 Atl. 858 (1908).

<sup>44</sup> .....La....., 74 So. 2d 1 (1954).

Grand Bay, a navigable body of water. The real issue was the ownership of royalty payments from a well drilled in the bay.

The heirs of the patentee claimed ownership and contended that the state was precluded from questioning the validity of the patent on the grounds of a six-year statute of limitations, passed in 1916, to run against patent defects.<sup>45</sup>

The court, in a 4 to 3 decision, held that the statute applied to all patents. The minority of the court argued that the sea bottom was of such a nature as not to be capable of private ownership. A bill is in the present session of the Louisiana Legislature purporting to codify the minority view.

Whether the bottom of navigable waters can be the subject of private ownership is a question that is not settled by decisions, and at least three theories have been put forth. The first is that such land is capable of private ownership,<sup>46</sup> the second is that it is capable of private ownership, but subject to an easement for public use,<sup>47</sup> and the third is that such land is incapable of private ownership.<sup>48</sup> In some states the test is based more or less on the size of the body of water in question,<sup>49</sup> while in others the question has been settled by statute.<sup>50</sup> In Texas the case of *Moore v. Ashbrook*<sup>51</sup> seems to indicate that the first view prevails in this state, but the case is not entirely in point.

The *California Co.* case, while not too important as a general precedent, due to the fact that it is based on local statute, presents another illustration of the problems that emerge when extremely valuable mineral assets are injected into an otherwise peaceful situation.

R. W. Hemingway.

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<sup>45</sup> Act No. 62 of 1912, LSA-RS., 9:5661.

<sup>46</sup> *Moore v. Ashbrook*, 197 S.W. 2d 516 (Tex. Civ. App. 1946) *error ref.*

<sup>47</sup> *Thies v. Platte Valley Public Power and Irrigation District*, 137 Neb. 344, 289 N.W. 386 (1939).

<sup>48</sup> *State v. West Tennessee Land Co.*, 127 Tenn. 575, 158 S.W. 746 (1913).

<sup>49</sup> *People v. Silberwood*, 110 Mich. 103, 67 N.W. 1087 (1896); *Delaplaine v. Chicago & N.W. Ry. Co.*, 42 Wis. 214, 24 Am. Rep. 386 (1877); *Gouverneur v. National Ice Co.*, 134 N.Y. 355, 31 N.E. 865 (1892).

<sup>50</sup> *Paine v. Woods*, 108 Mass. 160 (1871).

<sup>51</sup> Note 46, *supra*.