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Security

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sons: (1) the evidence establishing use and possession in Parsons was inconsistent with a hostile claim of ownership and so did not raise such a presumption, and (2) Parsons' deception in allowing defendant to believe the disputed land belonged to him was in no way chargeable to plaintiff or his predecessor. Thus, the court followed the general rule that an adverse claimant, in order to fulfill the requirement of hostile possession, must do some positive act so as to serve notice on the record owner that the former is claiming exclusive ownership of the property.[15] For the court to decide otherwise would be to hold that Gilbert by his own act of erecting a division fence wholly on his own land defeated his own title, while Parsons in merely grazing his cattle acquired a limitation title.

J. J. Kilgariff.

SECURITY

Texas. Humble Oil & Refining Company v. Atwood[1] probably represents the last in a series of suits filed by the plaintiffs in this case. They, along with other heirs, inherited the King Ranch, which was for a time administered by trustees. Three suits were prosecuted to judgment in the United States District Court for the Southern District of Texas, all styled *Atwood v. Kleberg.*[2] Among other things, these suits attacked the validity of oil and gas leases executed by the trustees. In the litigation in the federal courts the validity of the leases was upheld. Subsequently the Atwoods brought the instant action in the state court.

The facts of the case are relatively simple. The trustees of the King Ranch gave a mortgage (deed of trust in form) on the ranch to Humble Oil and Refining Company as security for a loan of several million dollars. At the same time, and as additional con-

[15] See authorities cited in 1 AM. JUR. *Adverse Possession,* § 130.

[1] .....Tex....., 244 S. W. 2d 637 (1951).

[2] Equity Actions Nos. 74 (on appeal, 163 F. 2d 108 (5th Cir. 1947)), 102 and 101 (on appeal, 133 F. 2d 69 (5th Cir. 1943), and on rehearing, 135 F. 2d 452 (5th Cir. 1943)).

sideration or inducement for the making of the loan, the trustees gave Humble an oil and gas lease on the mortgaged properties, for which annual rental was to be paid by Humble. The Atwoods as plaintiffs contended that it was understood that the lease was additional security for the loan, and not an independent transaction, and that repayment of the loan would terminate the lease. The Texas Supreme Court found no such intention expressed in the instruments and refused to admit parol evidence to establish such intent.

In a scholarly opinion in which he summarized the development of the Texas law on mortgages and security, Justice Wilson, writing for the court, held that an oil and gas lease cannot be both a mortgage and a grant of minerals, that in this case it was a grant of minerals and nothing else, and that repayment of the debt secured by the deed of trust terminated the mortgage but did not terminate the oil and gas lease.

Under the strict English rule against fetters[3] the Atwoods might successfully have contended that upon repayment of the loan they were entitled to receive the property back in the same form as when it was mortgaged—free from the oil and gas lease. There would have been no question of intent, interpretation of the instruments, or the introduction of parol evidence, for under the strict English rule any provision purporting to deprive the mortgagor of his right to receive the property back in the same form in which it existed prior to the mortgage would have been struck down. This rigid rule has been modified even in England, and it has not been applied in the United States.[4] It is important, nevertheless, to recognize that English equity courts did at one time invalidate any bargain binding the mortgaged property beyond the redemption period, for this shows an underlying equitable principle in support of the Atwoods' claim.

The main argument advanced by the plaintiffs was that the

[3] OSBORNE, MORTGAGES (1951) § 99.

[4] *Ibid.*

defeasance clause in the deed of trust required a termination of the oil and gas lease when the land was freed from the mortgage, the lease having been executed as a part of the consideration for the loan secured by the mortgage. It was contended that, since the presence of a defeasance clause in the deed of trust made the understanding of the parties a question for the court, parol evidence was unnecessary to establish that the lease was in effect a grant with a determining condition as expressed in the defeasance clause. This contention was based on the argument that any instruments forming all or a part of the consideration for the loan must be construed with the deed of trust, thus bringing the oil and gas lease within the operation of the defeasance clause. This seems an unwarranted inference based upon a strained interpretation of the holdings in several Texas cases cited by the plaintiffs.[5] These cases established the rule that where two or more instruments are, when taken together, a mortgage, they must be construed as one to give that result. Whether the defeasance clause is provided for in the same instrument as the conveyance of an interest is not material. It does not follow, however, that in the principal case the defeasance clause applied to the lease merely because the mortgage and the lease were executed at the same time and the lease was granted as a part of the consideration for the loan. Indeed, the terms of the lease negatived rather than supported such a view.

Since there is no rule of law or equity now in effect which would prevent the mortgagor from executing a lease to the mortgagee as a separate transaction, or to a third party subject to the mortgage, it seems that the Atwoods' argument that the defeasance clause in the deed of trust automatically applies to the lease is untenable. In other words, proof of the intention of the parties would be required. The court held that oral evidence to prove that the parties intended the lease to terminate when the loan was re-

[5] Boatright v. Peck, 33 Tex. 68 (1870); Walker v. Wilmore, 212 S. W. 655 (Tex. Comm. App. 1919), and others.

paid would be inadmissible under the parol evidence rule. The question is thus raised whether the ruling was too strict an application of the rule in view of the overriding equitable principle that operation of the parol evidence rule shall not rob a borrower of his equity of redemption.

For some time after the decision in *McMurry v. Mercer*[6] parol evidence to establish that alleged deeds were actually mortgages was received only when the consideration was non-contractual. This restruction has since been eliminated, the supreme court in *Bradshaw v. McDonald*[7] reaffirming the decision in *Austin v. Austin*[8] that parol evidence is admissible to show that a deed containing contractual consideration was a mortgage. Regardless of the type of consideration, the introduction of parol evidence would seem to be admissible to prevent anything approximating a strict foreclosure, under which a necessitous borrower would be placed in a position where he could not exercise his equity of redemption.

Several statements in the opinion show that an arrangement whereby the leases would terminate upon repayment of the debt would be most illogical and unwise from Humble's viewpoint. It would put Humble in the position of the risk-taker (in drilling for oil and gas), while the lessor-mortgagor would be able to use royalties in case of production to repay the debt and cut off Humble's right to share in the profits flowing from the production achieved by its exploratory work. This would be a most unusual and unlikely situation, but there seems to be no reason why the court should refuse to let the mortgagor-lessor attempt to prove by parol evidence that this had been the arrangement intended by the parties. The points made by the court would, of course, be effective arguments in negativing such an arrangement, but the fact that the situation is unlikely and the proof difficult seems an insufficient reason to exclude parol evidence.

The court recognized that an absolute deed is not the only in-

[6] 73 S. W. 2d 1087 (Tex. Civ. App. 1934).
[7] 147 Tex. 455, 216 S. W. 2d 972 (1949).
[8] 143 Tex. 29, 182 S. W. 2d 355 (1944).