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One Year Review of Property

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This article does not purport to be a complete exposition of all Colorado cases affecting property decided by the Supreme Court of Colorado in the past year. We have selected a few cases which we believe are worthy of comment and have attempted to classify them roughly as to their application within the field of property law.

RACE RESTRICTIONS

In *Capitol Federal Savings and Loan Ass'n v. Smith*,[1] the Colorado Supreme Court considered the validity and enforceability of an agreement between the owners of certain lots which provided that lots owned by them should not be sold or leased to colored persons and further provided for forfeiture of any lots or parts of lots sold or leased in violation of the agreement to such of the then owners of other lots in said block who might place notice of their claims of record.

The plaintiffs alleged that they are colored persons of Negro extraction and that the interests or claimed interests of defendants claiming under the agreement were without foundation or right and in violation of the Constitution of the United States and that the agreement was a cloud on the title which should be removed.

The district court found that the plaintiffs were the owners in fee simple of the property involved and quieted their title free and clear of any right of enforcement or attempted enforcement of the restrictive covenant. The district court further decreed that the restrictive covenant, "may not be enforced by this court as a matter of law as to enforce same by this court would be a violation of the equal protection clause of the fourteenth amendment of the United States Constitution and the enforceability of same is hereby removed as a cloud upon the title of plaintiffs."[2]

Counsel for defendants attempted to distinguish the case from pertinent Supreme Court cases,[3] on the basis that the Supreme Court of the United States in those cases did not have before it an agreement for automatic forfeiture, nor did any of them create a future interest in the land. Counsel for defendants contended that the agreement in question did not create a private anti-racial restrictive covenant but instead created a future interest in the land known as an executory interest which vested automatically upon the happening of the events specified in the original instrument or grant. The defendants' contention then went on to the effect that the trial court's failure and refusal to recognize such vested interest deprived the defendants of their property without just compensation and without due process of law. The supreme court refused to draw the distinction, saying, "No matter by what ariose terms the covenant under consideration may be classified by astute coun-

[1] 316 P.2d 252 (Colo. 1957).
[2] Id. at 254.
[3] Barrows v. Jackson, 346 U.S. 249 (1952); Shelly v. Kraemer, 334 U.S. 1 (1947).

sel, it is still a racial restriction in violation of the fourteenth amendment to the federal Constitution."[4]

PRIORITY OF FEDERAL INCOME TAX LIEN

In *United States v. Vorreiter*,[5] the question of relative priority of federal income tax liens and mechanics' liens was considered by the supreme court. Eldridge S. Price, a resident of Texas, owned improved property in Larimer County. While he was such owner the United States assessed income taxes against Price and his wife. On July 23, 1953, the collector of internal revenue at Austin, Texas, received income tax assessment lists against the Prices. Other income tax assessment lists were received by the same collector on August 27, 1953, and on December 3, and on December 31, 1953. Notices of liens for these taxes were not recorded in Larimer County until December 16 and December 31, 1953.

Between August 6, 1953, and August 14, 1953, Vorreiter and others entered into contracts to perform services and furnish materials in connection with improvements on the Price property in Larimer County. Performance of these contracts was commenced on various dates starting August 6, 1953, and ending August 20, 1953. The completion date was some time in October of 1953. Lien statements were filed by the several claimants between October 30, 1953, and December 5, 1953.

The United States took the position that federal tax liens are inferior only to prior recorded liens which are certain and perfected before the federal tax lien attaches, and contended that the mechanics' liens were inchoate until perfected by judgment. The Colorado Supreme Court decreed priority to the respective liens in accordance with the recording dates of the liens thereby giving priority to the mechanics' liens over the federal tax liens. The decision of the Colorado Supreme Court was reversed by the Supreme Court of the United States.[6]

ADVERSE POSSESSION

In *Archuleta v. Rose*,[7] the supreme court considered the character of adverse possession. The subject of the controversy was a vacated street in Irondale in Adams County. The street was platted and dedicated in 1889. For more than fifty years a fence had enclosed the property to which the Archuletas held record title as well as the entire area comprising the former street. The plaintiff Rose held the record title to adjacent property east of the fence. She brought an action against the Achuletas to establish ownership of the one-half of the vacated street contiguous to the land to which she held record title.

The Archuletas denied the Rose claim of title and alleged that they and their predecessors had been in adverse possession of the strip for more than eighteen years and that for more than twenty years the old fence in question had been recognized as the true boundary line between the properties. The lower court found the issues in favor of Rose and entered judgment awarding Rose sixteen feet of the disputed east half of the vacated street. As to the remaining fourteen feet of the thirty foot strip, the trial court held that, due to misdescriptions not here important, neither the Archuletas nor Rose had established title. No error was directed to this ruling.

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[4] 316 P.2d at 255.
[5] 134 Colo. 543, 307 P.2d 475, 34 DICTA 186 (1957).
[6] United States v. Vorreiter, 78 Sup. Ct. 19 (1957).
[7] 315 P.2d 201 (Colo. 1957).

One Trippel, called as a witness for the Archuletas, testified that he had owned the property in controversy from 1931 to November, 1937, and that he farmed the strip in dispute up to the old fence each year except in 1936 and 1937, which were dry years with no well water on the place. He further testified that he did not consider the old fence to be the actual east boundary of this property, that he could not make claim and never had made claim to ownership of the area which was supposed to be a street and that he temporarily farmed the area which had been a street because nobody else was using it. The court held that Trippel's testimony negatived any intent on his part to claim ownership or to hold the property as his own hostile to the claims of all others. The supreme court held that the disclaimer of Trippel was fatal both to the claim based upon adverse possession and to that based upon acquiescence in a boundary. The court said: "The very essence of adverse possession is that the possession must be hostile, not only against the true owner but against the world as well."[8]

In the lower court the Archuletas petitioned for the appointment of a commission under the statute[9] to determine the true boundary. The trial court denied the request and the supreme court affirmed the trial court's decision in this respect on the basis that there was no dispute as to the location of the boundaries of the vacated street or the fence, so the act was inapplicable.

Rights of Unkown Persons

Bowen v. Turgoose,[10] was an action to enjoin the defendants from placing bars, gates and locks on what the plaintiff alleged was a public road running through lands owned by the defendants. The Ward Gulch Road was used by the public continuously from 1888 until 1953 when the defendants blocked it. The road, which runs through by the defendants' land, was a public road prior to the issuance of a United States patent in 1892 to the predecessors in title.

The defendants took the position that the plaintiff's action was barred because of a quiet title decree embracing the defendants' land entered more than seven years prior to the institution of the plaintiff's case and that a public trustee's deed issued in 1926 under foreclosure of the land now owned by the defendants precluded the action.

The court pointed out that neither the plaintiff, his predecessors in interest, nor the public were parties to the quiet title action and that the making of "unknown persons" parties defendant in the action was not sufficient to cut off the rights of the public in and to an easement. The court cited the Utah case of *Hammond v. Johnson,*[11] which held that an action to quiet title determines only that the prevailing party has title superior to, or good against the title asserted by his adversary, and the judgment affects no one but the parties claiming by, through or under them, and does not affect any rights which the state or any other person, not a party or claiming under a party, has or could assert to the property in question.

With reference to the public trustee's deed the court held that public easements are not subject to the bar of the statute of limitations.

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[8] Id. at 203.
[9] Colo. Rev. Stat. Ann. § 118-11-1 et seq. (1953).
[10] 314 P.2d 694 (Colo. 1957).
[11] 94 Utah 35, 75 P.2d 164 (1938).

TAX TITLES

Three cases decided by the Colorado Supreme Court during 1957 involving tax titles are worthy of comment.

In *Blue River Co. v. Rizzuto,*[12] the supreme court held that the failure of the county commissioners of Summit County to select a newspaper of general circulation published in said county, in which the treasurer should publish the delinquent tax list, invalidated a subsequent tax sale and the treasurer's tax deed. The uncontradicted evidence was that the county commissioners did not make a selection of the *Summit County Journal,* the paper in which the delinquent tax list was published, and moreover the owner of the *Journal* testified that there was no contract entered into between him and the county commissioners. The court held that the selection or designation of a newspaper for the publication of delinquent tax lists is jurisdictional.

The case has excited considerable comment and voices have been heard to proclaim that from now on no tax title is safe. The authors, however, are of the opinion that the case merely illustrates one of the possibilities that gives rise to the universal opinion among Colorado lawyers that title based upon a treasurer's deed is unmarketable until nine years after the recording of such treasurer's deed. The plaintiff brought his quiet title action before his nine year period had elapsed for the purpose of rendering merchantable a title that was unmerchantable because it was a tax title and, when his action was opposed, found out why his title was unmerchantable.

In *Jacobs v. Perry,*[13] the plaintiff brought an action to quiet title to seven mining claims. Her title was derived from treasurer's deeds issued February 25, 1938. The plaintiff filed her action sixteen years and two months after the date of the treasurer's deeds. The defendants claimed title by adverse possession under the eighteen year and twenty year statutes of limitations and seven years possession under color of title and payment of taxes.[14] They also set up the defenses of estoppel and laches. The court held that the treasurer's deeds created virgin titles to the mining claims clear of all prior titles, liens, rights of possession or other claims.

Because Jacobs had a virgin title commencing sixteen years and two months prior to the filing of the action, the court took the position that the defendants could not establish a sufficient time period under either the eighteen year or the twenty year statutes. Further, the defendants could not prevail on the seven year statute because they had no clear title since the deed expressly excepted the mining claims and because the plaintiff had paid all taxes "legally assessed" against the mining claims.

The property had been subject to a double assessment, one in the name of the plaintiff and the other in the name of the defendants. Both assessments were paid. The court took the position that the assessment in the name of the defendants was an unlawful assessment and the taxes based thereon were not legally assessed because the defendants were strangers to the title.

And, since the defendants were trespassers after February 25, 1938, they could not assert the defense of estoppel because they were not inno-

[12] 312 P.2d 1023 (Colo. 1957).
[13] 313 P.2d 1008 (Colo. 1957).
[14] Colo. Rev. Stat. Ann. § 118-7-6 (1953).

cent persons, but deliberate trespassers. With respect to the defense of laches, the court said that it is not available in a quiet title action. The court further pointed out that courts will not invoke equitable defenses to destroy legal rights where statutes of limitations are applicable.

Another case involving a quiet title action brought to confirm a tax title is *Harrison v. Everett*.[15] Harrison, plaintiff in the lower court, claimed title to certain property. The origin of his title was a treasurer's deed dated, acknowledged and recorded on March 15, 1938. Chaffee County on January 29, 1945, had conveyed the property to Solomon Grodal. By quit claim deed recorded February 5, 1953, Solomon Grodal conveyed the property to the Harrisons. The defendants claimed title to a part of the property by virtue of adverse possession over a period of approximately fifty years.

The court held that the issuance of a valid treasurer's deed created a virgin title erasing all former interests in the land. More specifically the court said that "title by adverse possession vanishes when the treasurer issues his deed in accordance with law for unpaid taxes."[16] The court stated further that in order for the defendants to start a new prescriptive title they must prove adverse possession commencing with the 29th day of July 1945, which was the date on which the property was conveyed by Chaffee County to Solomon Grodal. The commencement of adverse possession could not have occurred during the period from March 15, 1938, when the county acquired title by the treasurer's deed, nor at any time subsequent to that time and before January 29, 1945, at which time the county conveyed the property, because there could be no adverse possession against the government. This left the defendants short a number of years on which to build another prescriptive title.

Lacking a prescriptive title the defendants were without a defense because of the rule of law of *Bennett v. Morrison*,[17] which held that the defendant in a suit to quiet title cannot question the right of the plaintiff unless he can show title in himself.

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15 308 P.2d 216 (Colo. 1957).
16 Id. at 219.
17 78 Colo. 464, 242 Pac. 636 (1925).