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ADVERSE POSSESSION - FUTURE INTERESTS - ADVERSE POSSESSION AGAINST REMAINDERMEN

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ADVERSE POSSESSION — FUTURE INTERESTS — ADVERSE POSSESSION AGAINST REMAINDERMEN — The life tenant of the premises in controversy purported to convey a fee title to defendant in 1920 and defendant has been in continuous possession claiming a fee title ever since. The life tenant died in 1931, and in 1938 the plaintiff remainderman commenced an action to clear his title and recover possession. The defendant claimed title by adverse possession on the ground that, since the remainderman had a statutory right to bring a suit to quiet title during the pendency of the life estate, the present action was barred by the ten year statute of limitations on actions to recover title or possession of land. *Held*, the action is not barred. The statute of limitations did not run until the death of the life tenant. *Maxwell v. Hamel*, (Neb. 1940) 292 N. W. 38.

Since the decision of *Criswell v. Criswell*,[1] Nebraska has been regarded as one of the few states [2] adhering to the view that the existence of the right in a remainderman to bring a quiet title action [3] before his interest became possessory was sufficient to start the statute of limitations running against him in respect to an adverse holder. This rule rested on the theory that since a remainderman could bring a quiet title action at any time, even though not entitled to immediate possession,[4] his cause of action arose when he had notice of the adverse claim.[5] In favor of such a rule it may be said that its application results in titles being cleared more promptly and marketability furthered.[6] Aside from the obvious hardship of such a rule, statutes authorizing quiet title actions are generally regarded as enabling acts intended to enlarge rather than restrict the remedy.[7] Also, since it is generally held that the owner of a life estate can convey no greater title than he has,[8] it is difficult to see how a transferee of a life tenant can hold adversely when it is generally conceded that a life tenant cannot.[9] The present decision brings Nebraska in line with the great weight of authority [10]

[1] 101 Neb. 349, 163 N. W. 302 (1917).

[2] Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 6 So. 197 (1888). Cf. Pierce v. Robinson, 118 Ala. 273, 24 So. 984 (1897); Commercial Bldg. Co. v. Parslow, 93 Fla. 143, 112 So. 378 (1927); Marray v. Quigley, 119 Iowa 6, 92 N. W. 869 (1902); First Nat. Bank of Perry v. Pilger, 78 Neb. 168, 110 N. W. 704 (1907).

[3] See PROPERTY RESTATEMENT (Tentative Draft, No. 6, 1935), p. 251, § 263, comment d; 3 NEB. L. BUL. 397 (1925); Sternberg, "Nebraska Against the Weight of Authority," 17 NEB. L. BUL. 347 (1938).

[4] Neb. Comp. Stat. (1929), §§ 76-401, 76-406, so construed in Morse v. Cochran, 131 Neb. 424, 268 N. W. 307 (1936).

[5] Criswell v. Criswell, 101 Neb. 349, 163 N. W. 302 (1917).

[6] 3 SIMES, FUTURE INTERESTS, § 778 (1936).

[7] 51 C. J. 136 (1930); Armor v. Frey, 253 Mo. 447, 161 S. W. 829 (1913).

[8] Pickett v. Doe ex dem. Pope, 74 Ala. 122 (1883); Le Sieur v. Spikes, 117 Ark. 366, 175 S. W. 413 (1915); Dennett v. Dennett, 40 N. H. 498 (1860).

[9] 1 AM. JUR. 860 (1936); Pickett v. Doe ex dem. Pope, 74 Ala. 122 (1883).

[10] 33 YALE L. J. 285 at 289, note (1923). Cases so holding: Hayden v. Hill, 128 Ark. 342, 194 S. W. 19 (1917); Neeley v. Martin, 126 Ark. 1, 189 S. W. 182 (1916); Richards v. Edwardy, 138 Ga. 690, 76 S. E. 64 (1912); Cross v. Janes, 327 Ill. 538, 158 N. E. 694 (1927); Chenoweth v. Bullitt, 224 Ky. 698, 6 S. W. (2d) 1061 (1928); Duncan v. King's Admr., 163 Ky. 577, 174 S. W. 34 (1915);

and in accord with the *Restatement*,[11] which seems to have greatly influenced the court's conclusion.[12] It is hoped that the present decision will settle the somewhat confused state of the law on this point in Nebraska.[13] Unfortunately, several factors may to some extent militate against the decision as a final determination. In addition to the fact that there was a dissenting judge,[14] it is not clear that the court found that the remainderman had sufficient notice of the adverse claim.[15] Furthermore, at one point the court attempted to distinguish the *Criswell* case on the narrow ground that in the *Criswell* case the adverse claimant was a stranger not in privity with the life tenant.[16] Also the court in speaking of the *Criswell* decision made certain statements respecting the effect of a court syllabus which may prove a boomerang to the present decision.[17] However, strong portions of the opinion make it fairly certain that the *Criswell* case is overruled [18] and that the Nebraska court is committed to the rule as laid down in the *Restatement.*

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Superior Oil Corp. v. Alcorn, 242 Ky. 814, 47 S. W. (2d) 973 (1930); Groves v. Groves, 57 Miss. 658 (1880); Clark v. Parsons, 69 N. H. 147, 39 A. 898 (1897); Webster v. Pittsburgh, C. & T. R. R., 78 Ohio St. 87, 84 N. E. 592 (1908); Aiken v. Suttle, 4 Lea (72 Tenn.) 103 (1879).

[11] PROPERTY RESTATEMENT, § 222, par. f (1936); see illustration 3, p. 905. Also see id., §§ 226 and 227.

[12] Principal case, 292 N. W. at 43.

[13] Sternberg, "Nebraska Against the Weight of Authority," 17 NEB. L. BUL. 347 (1938); Criswell v. Criswell, 101 Neb. 349, 163 N. W. 302 (1917), overruled prior cases such as Bohrer v. Davis, 94 Neb. 367, 143 N. W. 209 (1913). See also Hobson v. Huxtable, 79 Neb. 334, 112 N. W. 658 (1907); Helming v. Forrester, 87 Neb. 438, 127 N. W. 373 (1910); McFarland v. Flack, 87 Neb. 452, 127 N. W. 375 (1910).

[14] Justice Johnsen's dissent was on the ground that a change of rule should not be permitted to affect title rights that had ripened while the rule of Criswell v. Criswell was in effect. Principal case, 292 N. W. at 45.

[15] Principal case, 292 N. W. at 40, 41.

[16] Id., 42.

[17] Id., 41, 42.

[18] Id., 45.