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Property—Power of Termination—Effect of Failure to Exercise Within a Reasonable Time

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recognizes the tortfeasor's death only insofar as his defenses are terminated thereby. There is no indication in the principal case that this issue was recognized or considered by the court.

It is unfortunate that the court in the principal case also did not consider the deceased's lack of opportunity to rebut the blood analysis. When a blood alcohol test reveals an alcohol content of 0.15 per cent or more by weight, Washington Revised Code section 46.56.010[11] raises a rebuttable presumption, in criminal prosecutions, of being "under the influence of intoxicating liquor." The court noted in *City of Seattle v. Bryan*[12] that a defendant's own testimony may be sufficient to overcome this presumption of intoxication. In the principal case, death precluded any possible explanation by decedent of the 0.14 per cent analysis of his blood. Admission of blood analysis results in a tort action alleging intoxication of a party no longer able to offer explanation of the results would seem to prejudice decedent's estate as defendant.

PROPERTY

Power of Termination—Effect of Failure To Exercise Within A Reasonable Time. The Washington court recently considered the effect of prolonged silence and lack of affirmative action by the holder of a power of termination after a condition subsequent has been broken. In 1884, the grantor conveyed land to a water company. The deed required that the land be used for a right of way to conduct water, enforceable by a power of termination reserved to the grantor and his heirs. The land was subsequently conveyed to plaintiff by a deed subject to the same condition. Prior to 1905, the condition occurred when the land was set aside for park purposes. Not until 1963, when the heirs of the original grantor filed a counter-claim to plaintiff's quiet title action, was forfeiture claimed under the power of termination. The trial court granted plaintiff's motion for summary judgment. On appeal, *held:* Failure to exercise a power of termination within a reasonable time after occurrence of a condition subsequent results in loss of the power of termination. *Metropolitan Park Dist. v. Unknown Heirs of John L. Rigney,* 65 Wash. Dec.2d 764, 399 P. 2d 516 (1965).

When a fee simple subject to condition subsequent in real property is created, the party entitled to enforce the condition is said to have a right of re-entry or a power of termination. This power of termination

[11] *Supra* note 4.
[12] 53 Wn.2d 321, 333 P.2d 392 (1958).

becomes a present possessory interest only when its holder takes some affirmative action. Until that time, the grantee's fee does not terminate.[1]

In the principal case, the court rejected an argument that plaintiff acquired a fee simple absolute by adverse possession. The court reasoned that it was conceptually illogical to assert that the holder of a fee simple subject to a condition subsequent may obtain the whole fee merely by staying in possession after breaking the condition. There can be no adversity, as any act of the grantee is consistent with his estate until the power of termination is exercised.[2] The court held, however, that the holder of a power of termination, "following a continuing breach of condition, is not entitled to endlessly sit by refusing to declare a forfeiture, and thus control the use of the property indefinitely."[3] The court reasoned that allowing the holder of a power of termination to refrain from taking affirmative action indefinitely contravenes sound economic policy by discouraging productive use of land. It also reasoned that "all policy considerations which justify the imposition of statutes of limitation would justify limiting the time within which an election could be made after breach of condition."[4]

Although there is support for the proposition that the power of termination can be lost by inaction, the courts differ as to the rule that should be applied.[5] Some courts have held that delay, no matter how long, does not preclude exercise of the power of termination unless substantial prejudice to the grantee or his successors in interest has resulted.[6] Other courts have held that delay past the statutory period of

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[1] Halverson v. Pacific County, 22 Wn.2d 532, 156 P.2d 907 (1945); RESTATEMENT, PROPERTY § 57 (1936).

[2] See Mills v. Pennington, 213 Ark. 43, 209 S.W.2d 281 (1948); New York v. Coney Island Fire Dep't, 170 Misc. 787, 10 N.Y.S.2d 164 (Sup. Ct. 1939), *aff'd*, 259 App. Div. 286, 18 N.Y.S.2d 923 (App. Div. 1940), *aff'd*, 285 N.Y. 527, 32 N.E.2d 827 (1941); Thompson v. Simpson, 128 N.Y. 270, 28 N.E. 627 (1891); RESTATEMENT, PROPERTY § 222, comment g (1936); SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 258 (2d ed. 1936). For a survey of the Washington law on adverse possession see Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. 53 (1960).

[3] 65 Wash. Dec.2d at 767, 399 P.2d at 518 (1965).

[4] *Id.* at 768, 399 P.2d at 518.

[5] Cases are collected in Annot., 39 A.L.R.2d 1116 (1955).

[6] Lowery v. Hawaii, 215 U.S. 554 (1910) (where Hawaii used land inconsistent with the conditions imposed on its use, but failed to elect either to forfeit the land and its improvement or pay $15,000, the Court found no substantial prejudice and allowed the grantor to recover the land and improvements); Riverton Country Club v. Thomas, 141 N.J. Eq. 435, 58 A.2d 89, *aff'd*, 1 N.J. 508, 64 A.2d 347 (1948) (where grantee used land twelve years contrary to conditions in the deed of conveyance and subsequently made improvements on the land, the court found no prejudice to the grantee where there was no proof that the grantor had *actual* knowledge of the misuse); New York v. Coney Island Fire Dep't, 170 Misc. 787, 10. N.Y.S.2d 164 (Sup. Ct. 1939), *aff'd*, 259 App. Div. 286, 18 N.Y.S.2d 923 (App. Div. 1940), *aff'd*, 285 N.Y. 527, 32 N.E.2d 827

limitations will preclude exercise of the power.[7] Apparently, however, the latter courts will require something more, such as substantial prejudice or the elements of estoppel, if the statutory period has not passed.[8] Still other courts have applied a reasonable time test.[9]

In the principal case, the Washington court impliedly rejected the view that, absent prejudice to the grantee, prolonged delay alone can never cause loss of the power of termination. Although the court did not discuss prejudice to the plaintiff in giving up a park which the public had used for over fifty years, prejudice to the grantee may still be a factor in the reasonable time test. It is conceivable that prejudice will become a more important operative factor as the time of delay becomes shorter.

The court's citation of particular cases suggests other possible factors of importance in determining reasonableness. In two of these cases the statute of limitations was stated to be a determining factor.[10] If the statute of limitations becomes a determining factor in Washington, it remains to be seen whether prejudice will be a necessary element when the delay is less than that period. In one case cited by the court, delay for eight months was held to be unreasonable, without discussion of prejudice.[11] In other cases, however, an element of estoppel was required.[12] Furthermore, it is submitted that a grantor should never lose his power of termination on the ground of unreasonable delay if he

(1941) (where the condition in the deed had been in continuous disregard for over forty years, the last fifteen of which the property remained vacant, the court found no prejudice); Ludlow v. Railroad Co., 12 Barb. 440 (N.Y. Sup. Ct. 1852) (where construction was not begun within the time set in the deed, but the grantee did subsequently build as planned without objection by the grantor, the court found that it would be prejudicial to enforce the power of termination); Annot., 39 A.L.R.2d 1116 (1955).

[7] See, *e.g.*, Jefferies v. State *ex rel.* Woodruff County, 216 Ark. 657, 226 S.W.2d 810 (1950); Hannah v. Culpepper, 213 Ala. 319, 104 So. 751 (1925); Annot., 39 A.L.R.2d 1116 (1955).

[8] See cases cited note 7 *supra.*

[9] See, *e.g.*, Goodman v. Southern Pac. Co., 143 Cal. App. 2d 424, 299 P.2d 321 (1956); Hale v. Elkhore Coal Co., 206 Ky. 629, 268 S.W. 304 (1925); 39 A.L.R.2d 1116 (1955).

[10] Jefferies v. State *ex. rel.* Woodruff County, 216 Ark. 657, 226 S.W2d 810 (1950); Hannah v. Culpepper, 213 Ala. 319, 104 So. 751 (1925); See Annot., 39 A.L.R.2d 1116 (1955). In Washington, the normal statutory period within which a suit to regain possession of land must be brought is ten years. WASH. REV. CODE § 4.16.020 (1951). In the principal case, because the plaintiff had paid taxes on the land and had been in possession under color of title, the seven year statutory period might have applied. WASH. REV. CODE § 7.28.070 (1951).

[11] Goodman v. Southern Pac. Co., 143 Cal. App.2d 424, 299 P.2d 321 (1956). In this case other conditions had also been broken. In regard to these conditions, there had been delays of thirty-two, twenty-three, seventeen, sixteen, and five years. The California court recognized that the eight month delay was short, but stated that it had to be considered along with acquiescence to the other broken conditions.

[12] See, *e.g.*, Jefferies v. State *ex. rel.* Woodruff County, 216 Ark. 657, 226 S.W.2d 810 (1950); Hannah v. Culpepper, 213 Ala. 319, 104 So. 751 (1925); Annot., 39 A.L.R.2d 1116 (1955).

did not have notice or could not be charged with notice of the fact that the condition subsequent had been broken.[13]

The rule in this case should not be extended to apply to a brief use of the property inconsistent with the conditions in the deed, followed by resumption of a proper use. In such a situation the grantee should not be able to successfully contend that the power to terminate for any future use inconsistent with the particular condition has been lost.[14] However, the grantee might successfully argue that the grantor should not be allowed to exercise his power to terminate with respect to the prior occurrence of the condition.

TORTS

Abolition of Doctrine of Charitable Immunities. The doctrine of charitable immunity in Washington appears to have been finally abolished by two recent decisions of the Washington Supreme Court. In *Friend v. Cove Methodist Chuch, Inc.*, 65 Wash. Dec.2d 155, 396 P.2d 546 (1964), plaintiffs attended a smorgasbord dinner at defendant's church as "invited members of the public."[1] Directed to a certain door as leading to the kitchen, plaintiff wife opened the door and was severely injured when she fell into an open furnace pit. In the second decision, *Herbert v. Corporation of Catholic Archbishop*, 65 Wash. Dec.2d 165, 396 P.2d 552 (1964), plaintiff attended a Rosary service and was injured when she tripped over a low wire fence. Each plaintiff brought action for personal injuries, alleging negligent maintenance of defendant's premises. The cause of action was dismissed by the trial court in *Friend*, and summary judgment for defendant was granted in *Herbert*. In successive en banc decisions on appeal, *held:* A religious charity may be sued by a non-paying patron for injuries sustained as a result of the charity's negligence, and the defense of charitable immunity from tort liability is abolished.

[13] With respect to adverse possession, the statute of limitations does not begin to run against an adverse possessor until a possession meets all the elements of adversity under the statute. In Washington adverse possession must be open and notorious. Slater v. Murphy, 55 Wn.2d 892, 339 P.2d 457 (1959). The word "notorious" means that for possession to be adverse, it must be such as to give actual or constructive notice of its existence to the land owner. Certainly it is enough if the owner has actual knowledge of the fact. This is not necessary, however, if the acts of possession are such as to charge a reasonable man in the owner's position with notice of adverse possession. Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. 53, 72 (1960).

[14] See, *e.g.*, Richie v. Kansas, N. & D. R.R., 55 Kan. 36, 39 Pac. 718 (1895); Annot., 39 A.L.R.2d 1116 (1955).

[1] 65 Wash. Dec.2d at 155, 396 P.2d at 547.