

February 1986
QUESTION 3

On Son's twenty-first birthday, his father, Vendor, gave him a house and lot to which Vendor had a good record title. The gift was made orally and Vendor gave Son the keys to the house. Son promptly took possession and occupied the premises for the next six years. During this time, he made substantial improvements to the house at considerable expense. At the end of the six years, Son's business required him to move to another city, and he listed the property with a local real estate agent for sale or for rent.

After the premises were vacated by Son, Vendor, without Son's knowledge, entered into a contract in writing to sell the house and lot to Purchaser, with transfer of title and possession to take place in sixty days. Purchaser paid one-half of the purchase price to Vendor when they signed the contract. When Vendor and Purchaser were negotiating the sale, Purchaser stated that it was his intent to raze the building and to erect a commercial structure on the land, and Purchaser signed the contract after he had ascertained that the intended improvement would not be in conflict with the local zoning ordinance. When Purchaser inspected the premises at the time of the contract, Son was not in possession and there were no sale or rental signs or other indications of Son's interest. A preliminary title insurance report obtained by Purchaser disclosed no such interest.

Two days before the scheduled transfer, the house was destroyed by fire through no fault of Vendor. Purchaser, having meanwhile discovered another lot better suited to his purposes and having learned that Son claimed title to the premises, notified Vendor that he considered the contract terminated. Purchaser demanded the return of his payment.

What are the rights and obligations of Vendor, Son, and Purchaser, if any, and to what relief, if any, is each entitled? Discuss.

ANSWER A TO QUESTION 3

Gift by V to S

Any transfer of property to be valid must comply with the Statute of Frauds which requires a signed writing.

Here there is no writing between V and S so the gift would be void. There is an exception, however, called estoppel, when the donee takes possession and makes improvements on the house in reliance upon the gift. The fact that V gave the keys at the same time stating the house is yours may show present intention of a gift much like delivery of a deed, but since there was no writing, the title will have to be received by estoppel. This is the case with S who lived on the land for six years and made substantial improvements.

Son may be deemed to be the owner, therefore, of the land. Even if it is deemed that the gift failed, there is a chance that S adversely possessed the land.

Even though the giving of the keys by V would seem to make this a permissive use. The fact that S held himself out to all the world as the owner of the property makes it adverse and also the fact that S attempted to sell the house also shows that he was open and notorious to the fact that he was the owner.

Whether S will be held to be in adverse possessor depends upon the statute of limitations in that jurisdiction.

Sale by V

The contract in writing by V and P and payment of consideration by P makes P a bona fide purchaser -- a purchaser for value without notice.

S may claim that V is not a bona fide purchaser if it is held that P should have had notice of the fact that the property was up for sale by S. This would give V constructive notice and quash his bona fide purchaser status.

Since, however, P checked the land and saw no for sale signs and since a title company made a search and found nothing, it may be held that P is a bona fide purchaser and as such, has a right to the property over S if S claims the property by estoppel.

If S took by adverse possession, however, P may be held to have constructive notice once again. However, the problem of the property being abandoned would come into play.

The Destruction of the House

Under common law, once the contract was signed equitable title in the property passed to P and with that passed the risk of loss, since the fire was not caused by V. Thus, P would still be held to the contract.

Under more modern law, title does not pass until the deed has been delivered or the purchaser takes possession.

Modern courts also look to see who the insured parties are. Since we have no

knowledge about insurance, however, it would be deemed that the property has not passed and P does not have to go through with the deal.

There is, however, the evidence that P planned to raze the building anyway. So in this case, there was no loss in reality.

The burning of the house does not make it impossible for V to perform since the house is not material to the transaction; in fact, P has saved money from the disaster. The land tendered is fit for P's purposes.

Purchaser's Withdrawal

If P is withdrawing from the contract because of the fire, it may be held that he is in bad faith and may have to go through with the contract because his interests were not adversely affected.

P may, however, still withdraw because of the fact that S has made a claim to the property. P will claim that he will not be given marketable title when the property is transferred.

Since there is no mention of what type of deed is to be delivered, it is deemed that a general warranty deed will be transferred. A general warranty deed is held to have a covenant of marketable title. Since the claim of ownership by S puts a cloud on the title, P may back out of the deal.

P, however, may be held to have to wait until title closes to give V a chance to clear title on the land. Since only two days remain before the closing, this would be difficult for V to do and thus P may be let out of the contract.

Rights and Obligations of S

If S holds the property by estoppel, his title will not be held to be good as to P who is a bona fide purchaser. S would then have to give up the property to P. S would still have a cause of action against V for the fair market value of the property since he took title by estoppel. If it is held that S held by adverse possession, S's title may be good as to anyone and P may have to go after V.

In either of these cases V's rights may turn on whether P had constructive notice of V's ownership -- should P be held to have checked the property out on the local real estate market to see if it was being held out for sale.

Rights and Obligations of P

If V can clear title by the time of closing, P will probably have to go through with the deal since he still will be receiving what he bargained for.

If V is held to have breached the covenant of marketable title, P will be able to release himself from the deal and get return of his deposit.

V's Rights and Obligations

If V's sale to P goes through and S had title by estoppel, V is liable for fair market

value to V. If S had title by adverse possession, V has nothing to give and thus must return the payment price to P.

ANSWER B TO QUESTION 3

Son's Rights

Conveyance of an interest in real property requires a deed that complies with the Statute of Frauds. Consideration is not essential. V gave S the house and lot orally but never executed a deed to S. V, therefore, will argue that no interest ever passed to S because the attempted conveyance is voidable by V under the Statute of Frauds.

However, S will claim that living in the house for six years and making substantial improvements takes this conveyance out of the Statute of Frauds. S reasonably relied on V's oral gift. This is a well recognized exception to the Statute of Frauds but may not apply because S was a donee, not a purchaser from V.

S should prevail though, since V was his father and a gift of real property under these circumstances seems quite normal.

Adverse Possession

If S did not acquire the property by conveyance, he may have acquired an interest by adverse possession. This requires possession that is adverse, open, notorious and continuous for the statutory period. The period begins to run when the owner's cause of action accrues against the person in possession. This period began when S took possession since V could have had S ejected at that point if S's possession was improper.

S's possession may not have been adverse or hostile since he occupied the premises under V's permission. V allowed S to be there. On the other hand, S had a claim of right to the property which he believed was his via the gift from V.

S should have acquired title by adverse possession if the applicable statute of limitations was for a period of six years or less. This is because he continuously and openly possessed the property for six years. No statute is given though, and many jurisdictions have periods of limitations greater than six years. At common law, it was 20 years. In such a jurisdiction, S did not obtain title by adverse possession.

Purchaser's Rights

Contained within every land sale contract is an implied covenant by the seller that upon closing, the seller will convey a marketable title. This is a title free from reasonable doubt.

V's title, if any, is not marketable. First, V may not even have title to convey to P. If S has title to the property, which is possible as discussed above, V does not have title to convey to P.

P can rescind the contract since both parties mistakenly believed that V had title. Even if P knew or should have known of S's title (i.e., was not mistaken), P could still rescind the contract.

V would have to return to P one-half of the purchase price already paid since it is impossible for V to convey title which he does not have.

However, if S does not have title, it appears that P is able to convey marketable title

to V. V had good record title and any title search would not have indicated that V did not have good title or already conveyed to another. There are no encumbrances (mortgages, etc.) which burden the title and when P viewed the premises, there was nothing to indicate that V's title was defective.

Hence, V should be able to specifically perform the contract with P. This remedy is always available in land sale contracts even by the seller since there is mutuality. V would convey to P and P would be required to tender to V the remaining purchase price.

Note that this contract is valid because it was in writing and sufficient consideration passed in the form of partial payment.

Risk of Loss

Under the doctrine of equitable conversion, the risk of loss is on the vendee of an enforceable land rule contract. Where the property is destroyed through no fault of the vendor, as here, the vendee still remains liable under the contract and cannot rescind. In many states, P would have to purchase from V even though the house was destroyed by fire. P bore the risk and would have purchased insurance to protect himself.

Under the Uniform Act, however, possession is determinative. P was not in possession and the risk of loss would not have been on P. Thus, P might rescind since the fire, which was not caused by V, destroyed the property and greatly decreased its value.

Nonetheless, this seems inequitable since P would have had the house razed upon obtaining title and both parties knew this. Rescission is an equitable remedy and a court of equity would not likely allow P to rescind under these facts. It would be unfair to allow P to get out of this contract when an event occurred which actually would have increased the value of the property to P. P would not have had to spend money to raze the building.

S V. V

S may have an action for damages against his father, V, for interfering with S's interest. It seems, though, that S has not incurred any damages because of V's conduct, because V was not responsible for the fire.