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review. Substantive due process, or reasonableness, in the administrative exercise of the quasi-legislative function will be examined, but it is not certain whether the citizen must present to the board in the first instance the evidence from which he draws his claim of unreasonableness or whether he may retain that evidence for presentation in court upon review.

The bar may well consider decisions of the Court with particular emphasis on the facts and the practical effect of the decision on the parties in the individual case. The Court has usually reached sound conclusions, although its reasons have not always been logically consistent. The resulting conflict of terminology, intermingled with the phraseology necessary to fit the action to the ancient writs used for review, may not be eliminated easily. Careful and discerning preparation of appellate briefs is required as an aid to the Court, inasmuch as its present rush of work places a greater responsibility upon the bar than ever before.49

JAMES W. MIDDLETON

TAX TITLE: PURCHASE BY CO-TENANT OR JOINT REMAINDERMAN IN EXPECTANCY

A person is disqualified to purchase a tax title when such purchase would enable him to take advantage of his own default in payment of taxes to strengthen his own title or to cut off the interests of other persons in the land.1 By the same token, a person who stands in a fiduciary capacity toward the person upon whom the duty rests to pay taxes is disqualified to purchase a tax title and to assert it for his own exclusive benefit.2 Although there are many different situations to which

2Rothwell v. Dewees, 2 Black 613 (U. S. 1862); Charles E. Gibson Co. v. Elze, 88 Colo. 181, 293 Pac. 958 (1930); Buffum v. Lytle, 66 Fla. 355, 63 So. 717 (1913); Tegert v. Lambach, 226 Iowa 1346, 286 N. W. 522 (1939); Layton v. Balcom, 64 N. H. 92, 6 Atl. 37 (1886); Morris v. Joseph, 1 W. Va. 256 (1866).
these principles can be applied,⁸ the purpose of this note is to examine their application to co-owners of an interest in land, present or future.

I. THE GENERAL RULE

One co-tenant may not purchase a tax title to the common property and assert it for his own exclusive benefit.⁴ He is regarded as having acquired it for the benefit of all co-tenants, provided they seasonably offer to contribute to the expense of purchasing the tax title.⁵ Some cases state that the rule is predicated on the concept that a relation of trust and confidence will be implied between co-tenants by reason of their common interest in the whole land. This concept prevents one co-tenant from taking any personal advantage of acts touching the common title of the subject-matter of the trust placed upon him.⁶ Other cases merely say that, since the duty to pay taxes rests upon all co-tenants equally, any one of them is disqualified to purchase a tax title in default of their mutual duty to pay the taxes.⁷ Both of these reasons


⁵E.g., Spencer v. Spencer, 36 So. 2d 424 (Fla. 1948); Andrews v. Andrews, 155 Fla. 654, 21 So. 2d 205 (1945); Williams v. Clyatt, 53 Fla. 987, 43 So. 441 (1907); Biggins v. Dufficy, 262 Ill. 26, 104 N. E. 180 (1914); Lawton v. Estes, 167 Mass. 181, 45 N. E. 90 (1896); Egan v. Egan, 98 N. J. Eq. 487, 131 Atl. 129 (1925); Gass v. Waterhouse, 61 S. W. 450 (Tenn. 1900); Allan v. Allen, 114 Wis. 615, 91 N. W. 218 (1902).


⁷Spencer v. Spencer, 36 So. 2d 424 (Fla. 1948); Andrews v. Andrews, 155 Fla. 654, 21 So. 2d 205 (1945); Williams v. Clyatt, 53 Fla. 987, 43 So. 441 (1907); Weare v. Van Meter, 42 Iowa 128 (1873); Venable v. Beauchamp, 33 Ky. 321 (1836); Van Horne v. Fonda, 5 Johns Ch. 388 (N. Y. 1821) (outstanding title); Lloyd v. Lynch, 28 Pa. 419 (1857).

⁸Chouteau v. Jones, 11 Ill. 300 (1849); Dubois v. Campau, 24 Mich. 360 (1872);
fit equally well within the general principle that a person cannot purchase a tax title if under a duty to pay the tax or obligated, even by implication, not to do so in violation of trust.\(^8\) The rule is applied to tenants by the entirety,\(^9\) joint tenants,\(^10\) co-partners,\(^11\) and very often to tenants in common.\(^12\) Upon principles of agency, the rule is applied with equal force to purchases by one co-tenant of the tax title from a stranger acting in fraud or collusion, demonstrated or implied.\(^13\)

II. LIMITATIONS OF THE GENERAL RULE

The general rule applies during the existence of the co-tenancy relation only.\(^14\) Consequently, a tax title purchased by a co-tenant before the beginning or after the termination of the co-tenancy may be held for the exclusive benefit of the purchaser.\(^15\) Some courts have gone to the extent of holding that one co-tenant may claim the exclusive benefit of a tax title when it is based on taxes becoming delinquent before the co-tenancy began.\(^16\) Other courts, however, make no such distinction and require that the tax deed must have been issued before the co-tenancy began.\(^17\) Although the Supreme Court of Florida has not discussed this problem, the latter view is presumably the law of Florida; in *Spencer v. Spencer*\(^18\) the tax title involved was based on taxes that had become delinquent before the time of purchase.

Lacey v. Davis, 4 Mich. 140 (1856); Downer v. Smith, 38 Vt. 464 (1865); see Smith v. Lewis, 20 Wis. 369, 375 (1866) (dissenting opinion).

\(^8\) THOMPSON, REAL PROPERTY §1862 (Perm. ed. 1940).

\(^9\) Andrews v. Andrews, 155 Fla. 654, 21 So.\(^2\)d 205 (1945); Busch v. Huston, 75 Ill. 343 (1874); Burns v. Byrne, 45 Iowa 285 (1876); Grant v. Burton, 26 S. D. 52, 127 N. W. 480 (1910).


\(^11\) Williams v. Clyatt, 53 Fla. 987, 43 So. 441 (1907).

\(^12\) See Dahlstrom v. Beard Fruit Co., 73 Wash. 13, 131 Pac. 450, 451 (1913).

\(^13\) Inman v. Quirey, 128 Ark. 605, 194 S. W. 858 (1917); Spencer v. Spencer, 36 So.\(^2\)d 424 (Fla. 1948); Peabody v. Burri, 255 Ill. 592, 99 N. E. 690 (1912); Duson v. Roos, 123 La. 835, 49 So. 590 (1909); Dubois v. Campau, 24 Mich. 360 (1872).


\(^15\) See note 14 supra.


\(^17\) Smith v. Smith, 68 Iowa 608, 27 N. W. 780 (1886); Hoyt v. Lightbody, 98 Minn. 189, 108 N. W. 843 (1906).

\(^18\) 36 So.\(^2\)d 424 (Fla. 1948).
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linquent before the plaintiff had acquired his interest. There is also a divergence of opinion as to when the co-tenancy is terminated. Some jurisdictions hold that, after the period of redemption has expired and a tax deed has been issued bona fide to a stranger, one co-tenant may purchase the tax title for his own exclusive benefit.\(^{19}\) Others require that, in addition to the issuance of a tax deed to a stranger, there must be an eviction of the co-tenant from the land, thus severing any possessory interests of the co-tenants.\(^{20}\) Of course, in neither case can one co-tenant affect an exclusive purchase from a stranger accomplished through fraud or collusion.\(^{21}\) The Florida Court has indicated in a dictum in *Spencer v. Spencer*\(^{22}\) that an eviction by the stranger, even in the absence of fraud, is necessary to terminate the co-tenancy relation.\(^{23}\)

A limitation that many courts have recognized arises when the co-tenants acquire their interests by different instruments and at different times. In such event the fiduciary relationship between them is not implied, with the result that either of them, upon purchasing a tax title, can claim the exclusive benefit of it.\(^{24}\) This limitation is usually construed strictly; it has been held that, when a confidential relationship did in fact exist between tenants in common at the time of acquisition of the tax title,\(^{25}\) or if one had at that time knowledge respecting the title superior to that of the other,\(^{26}\) the general rule will be applied. Similarly, some opinions in other jurisdictions indicate that, if the purchasing co-tenant is in possession even though he acquired his interest under a dif-


\(^{21}\)Watkins v. Eaton, 30 Me. 529 (1849).

\(^{22}\)36 So.2d 424, 426 (1948).

\(^{23}\)See note 20 supra.


\(^{26}\)See Hodgson v. Federal Oil Development Co., 274 U. S. 15, 19 (1927); *Freeman, Cotenancy §159.*
ferent instrument and at a different time, the general rule still applies. The Florida Court has had no opportunity to consider this question, but it may be well to observe that the tendency is to break away from this distinction and to hold that the single unity of the right to possession, in instances of acquisition of interests by different instruments and at different times, is sufficient to imply a relation of trust and confidence between the co-tenants.

In a few cases, in which the taxes have been assessed separately against each co-tenant's undivided interest, either has been allowed to purchase the tax title to the interest of his co-tenant, in the absence of fraud or collusion. This is clearly noted in those instances in which the co-tenants are in possession of distinct sections of the undivided tract and are assessed separately. In such event, each co-tenant is under a duty to pay his own taxes only and not those assessed against the others. This absence of liability for the taxes of others eliminates any impediment to the right to purchase. A further result of separate assessment is a reduction in the force of the argument based on interdependence in the protection of the title, thus minimizing the necessity for implying a confidential relationship.

III. Joint Remaindermen in Expectancy and the Life Estate

There is little authority as to whether a joint remainderman in expectancy will be permitted to purchase a tax title to the whole fee and claim exclusive benefit therefrom against his co-remaindermen. Most cases involving this point have held that such a purchase enures to the benefit of the co-remaindermen. These decisions apparently rest on

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27 See Dahlstrom v. Beard Fruit Co., 73 Wash. 13, 131 Pac. 450 (1913) (on the theory that the possession of the one co-tenant would lead the other co-tenants to believe that the co-tenant in possession would pay taxes).
28 Cohea v. Hemingway, 71 Miss. 22, 14 So. 734 (1893).
29 Rothwell v. Dewees, 2 Black 613 (U. S. 1862); Smith v. Borradaile, 30 N. M. 62, 227 Pac. 602 (1922); Gass v. Waterhouse, 61 S. W. 450 (Tenn. 1900); cf. Montague v. Selb, 106 Ill. 49 (1883).
31 Davis v. Cass, 72 Miss. 985, 18 So. 454 (1895).
33 Johns v. Johns, 93 Ala. 239, 9 So. 419 (1890); Wilson v. Linder, 21 Idaho
an implied relation of trust and confidence between joint remaindermen, even before interests vest in possession.\(^{34}\) Thus the same rule applied to co-tenants in possession is applied to joint remaindermen in expectancy. Nevertheless, it has at least twice been held that a purchase by one co-remainderman will not enure to the benefit of other co-remaindermen. The theory of these cases rests on the questionable premise that the relation of trust and confidence normally implied between co-owners of land arises exclusively from a mutual duty to pay taxes, as distinct from mutual interest, and that since this duty rests on the life tenant alone, no relation of trust and confidence should be implied between co-remaindermen.\(^{35}\) This view opens the door to sharp practice among co-remaindermen to the same extent obtaining in the case of co-tenants. The relation of trust and confidence and the obligation to deal fairly arise as much from community of interest as from a mutual obligation to pay taxes.\(^{36}\)

If, then, the purchase of a tax title by one co-remainderman enures to the benefit of the others,\(^{37}\) is the purchasing co-remainderman entitled to exclusive possession during the life estate or should the life tenant be restored to possession?\(^{38}\) A West Virginia case\(^{39}\) holds that the remainderman owes a fiduciary duty toward the life tenant\(^{40}\) as well as to his co-remainderman, and that accordingly the purchase of a tax title by one co-remainderman amounts merely to a redemption of the property for all sharing in the estate, regarded as a whole.\(^{41}\) It follows that the life tenant is restored to possession; in other words, the remainderman-life tenant relationship is treated on the same basis as

\(^{34}\)See note 33 supra.

\(^{35}\)Crawford v. Meis, 123 Iowa 610, 99 N. W. 186 (1904) (distinguished in Patty v. Payne, 178 Iowa 593, 159 N. W. 1012 (1916), at least when remainderman is not in possession); Jinklaway v. Ford, 93 Kan. 797, 145 Pac. 885 (1915).

\(^{36}\)See note 17 supra; Van Horne v. Fonda, 5 Johns. Ch. 388 (N. Y. 1821).

\(^{37}\)See note 33 supra.

\(^{38}\)A remainderman in severalty may purchase tax title and exclude the life tenant in the absence of fraud, bad faith or officiousness. Duffley v. McCaskey, 345 Mo. 550, 134 S. W.2d 62 (1939).


\(^{40}\)See Hall v. Hall, 173 Minn. 128, 216 N. W. 798 (1927).

\(^{41}\)Because of peculiar circumstances, Callihan v. Russell, 66 W. Va. 524, 66 N. E. 697 (1909), cannot very well be considered a concrete authority on this proposition.
that of co-tenants in possession. It is doubtful, however, whether there is any basis for holding that the remaindermen owe an implied fiduciary duty toward the life tenant, inasmuch as they do not enjoy the advantages of possession and are not charged with such responsibilities as payment of taxes and protection of the title for other interests in the land.\(^4\) If no implied fiduciary duty exists on the part of the remaindermen toward the life tenant,\(^5\) the soundness of the concept that a remainderman can redeem no less than the estate as a whole is open to serious doubt. An opposite result was reached in a Mississippi case,\(^6\) in which without a thorough discussion the court held that a co-remainderman purchasing a tax title acquired thereby the remaining portion of the life estate, and that the other co-remaindermen could not claim any benefit under the tax title until the death of the life tenant. At this point their remainder came into possession. Although no other case has been found discussing the correctness of this latter holding, it seems preferable upon analysis. The precise question is whether the disqualification to purchase the remainder extends to the life estate as well.

In most jurisdictions, including Florida, a tax title operates to give a new and independent fee simple title from the state. This terminates all rights to the land,\(^7\) including remainder interests.\(^8\) The courts, however, impose a disqualification to acquire a tax title both when this will enable the purchaser to take advantage of his own default in payment of taxes, so as to cut out the interests of others in the land,\(^9\) and when it will enable him to take an inequitable advantage of the delinquent taxpayer.\(^10\) Therefore, if a remainderman owes neither a duty to pay taxes on the land\(^11\) nor any fiduciary duty toward the life ten-

\(^{41}\) See Jinkıaway v. Ford, 93 Kan. 797, 145 Pac. 885, 888 (1915); 3 SIMES, FUTURE INTERESTS §637 (1936).

\(^{42}\) See note 41 supra.

\(^{43}\) Fox v. Coon, 64 Miss. 465, 1 So. 629 (1886); see Johns v. Johns, 93 Ala. 239, 9 So. 419, 421 (1890) (the purchasing remainderman's right to possession of the life estate was not challenged by the life tenant).

\(^{44}\) Fla. Stat. §194.53 (1941); Torryson v. Dutton, 137 Fla. 683, 188 So. 805 (1939); see Note 75, A.L.R. 416 (1931).


\(^{46}\) See note 1 supra.

\(^{47}\) See note 2 supra.

\(^{48}\) Duffley v. McCaskey, 345 Mo. 550, 134 S. W.2d 62 (1939); In re Gaffer, 254 App. Div. 448, 5 N. Y. S.2d 671 (1938); In re McCarty, 158 Misc. 287, 285 N. Y.
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ant, the disqualification as to the life tenant should not be imposed upon him; but, when there is an implied relation of trust and confidence between co-remaindermen, even though there is no mutual duty to pay taxes, the disqualification of either one as against the other should be imposed. Applying this reasoning, the purchasing co-remaindermen should be able to acquire exclusive possession of the remaining portion of the life estate as against both the life tenant, since no disqualification to purchase tax title exists as to him, and as against the other co-remaindermen, since their right to possession does not accrue until the death of the life tenant. The life tenant would be in no position to assert that the tax title also enured to his benefit, because it was through his own default and neglect that the taxes became delinquent and the land was sold for taxes. Nor would this result jeopardize the interests of the other co-remaindermen since, upon a threat to these interests, a bill in equity to quiet title would lie to preserve the remainder interest and insure its vesting at the proper time. Had one remainderman purchased the interest of the life tenant by deed and gone into possession, their position would be the same.

Some light is shed on this problem by a Florida statute which provides that any portion of land, or any interest therein contained, may be redeemed according to the proportionate value of the part or parts so redeemed. This statute was apparently designed to permit a redemption of a geographical portion of the land, and it does not strictly apply to the question of whether a purchase of a tax title by one co-remainderman automatically enures to the benefit of the life tenant along with the other co-remaindermen. Inasmuch, however, as the person redeeming may salvage a geographical part without obtaining the whole from a quantitative standpoint, it may well be argued that there would likewise

Supp. 641 (1936) (duty to pay taxes rests on the life tenant).

See note 43 supra; Duffley v. McCaskey, 345 Mo. 550, 134 S. W.2d 62 (1939).

See Note 33 supra.

See note 49 supra.


See Duffley v. McCaskey, 345 Mo. 550, 134 S. W.2d 62 (1939).


Frank v. Frank, 305 Ill. 181, 137 N. E. 151 (1922); McLaughlin v. McLaughlin, 80 Md. 115, 30 Atl. 607 (1894) (no merger of estates in favor of other remainderman when one of them purchases the interest of the life tenant by deed).

be no objection to a redemption of a qualitative share of the full ownership therein. If this inference is followed, a purchase of a tax title by one remainderman, although amounting to a mere redemption as to other remaindermen, need not necessarily be a redemption as to the interest of the life tenant.

In *Spencer v. Spencer* the homesteader died in possession of homestead realty, leaving a widow and several children surviving. Several years after his death, one of the sons acquired a tax title to the property through another person and went into possession without molesting the widow. Some years later the widow died. The son continued in possession for several more years and then bought a suit to quiet title against other brothers and sisters. The Court held that all the children were entitled to the land merely by applying the general rule, on the theory that they were co-tenants in possession immediately upon the death of the father. Under the statute governing descent of homestead realty the widow took a life estate with vested remainders in the children. Accordingly it was then necessary to determine whether one co-remainder could purchase a tax title against other co-remaindermen; but the Court for some reason failed to note the point. Decisions in most jurisdictions sustained the result. Since the widow, however, was dead at the time of the suit and the remainder had vested in possession, the question as to whether the plaintiff was entitled to exclusive possession until the death of the widow was moot. Nevertheless, it might have been material to determine whether the plaintiff's alleged adverse possession for over seven years ran against the remaindermen, had the pleadings raised this point, or to rule on the sufficiency of notice of his adverse claim against them.

IV. Conclusion

The principles discussed should not be regarded as concrete rules of property to be followed in every instance. Since the right of co-tenants to share in the benefit of a tax title purchased by one co-tenant is one of equitable cognizance, that right may be defeated by laches. A

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66*36 So.2d 424 (Fla. 1948).
67*FLA. STAT. §731.27 (1941).
68See note 33 supra.
70Gilb v. O'Neill, 225 Ala. 92, 142 So. 397 (1932); Wilson v. Linder, 21 Idaho 576, 123 Pac. 487 (1912); Lee v. Fox, 36 Ky. 171 (1838); Harrell v. Harrell, 174