Mercer Law Review

Volume 2
Number 1 *Annual Survey of Georgia Law*

Article 18

12-1950

Property, Real

Stephens Mitchell

REAL PROPERTY

By STEPHENS MITCHELL*

The recent Georgia cases dealing with Real Property show a continued adherence to age-old rules but which broaden down from precedent to precedent to fit the changing character of circumstances.

ADJOINING LANDOWNERS

The ancient way of determining boundaries was by a processing, to be held once each year. The primary object of processioning is to settle boundary disputes. It is a summary proceeding and is not designed to be a substitute for ejectment. Title is not directly involved[1] although a judgment in a processioning case[2] is res adjudicata in an ejectment suit where the question at isssue is *solely* as to the location of the boundaries of the parties.[3]

In *Bridges v. Brackett*[4] it was held that if a party entered into possession under the mistaken idea that the boundaries given in his deed included the land sued for, this fact would not prevent such actual adverse possession from ripening into a prescriptive title in 20 years, nor would such mistake render the possession fraudulent, for an honest mistake is not fraud.

It will be noted that under Georgia's original processioning laws, such a mistake would have been discovered in a year.

Green v. Stafford[5] calls attention to the fact that though a survey made in 1938 showed the line to be the one claimed by the plaintiff, yet there had been possession up to it only from 1945 to 1949. In such a case the plaintiff fails to recover. In *Warwick v. Ocean Pond Fishing Club*[6] the court held that while it is necessary that the dividing line be in dispute, uncertain or unascertained before it can be established under the provision of the Code,[7] yet where the evidence shows the marking and establishing of a line that had never been marked on the premises, and acquiescence by acts or declarations of the adjoining owners for more than seven years, a verdict in favor of the line thus established is demanded by the evidence. This, of course, falls under the heading of an unascertained line.

The case of *Hickox v. Griffin*[8] follows the usual rule for disputed boundaries.

---

*Member Atlanta Bar; B.A., 1915, University of Georgia; Attended Harvard Law School, 1915, 1916 and 1917; LL.B., 1919, Atlanta Law School; Author *Real Property in Georgia*, Assisted by J. B. Kilbride (Curtiss Publishing Co., 1945), Co-author, *Powell On Actions For Land* (Revised Edition) with Arthur G. Powell (The Harrison Company, 1946); Member Georgia Bar Association.

1. Stanfill v. Hiers, 81 Ga. App. 874, 57 S.E.2d 851 (1950).
2. GA. CODE § 85-1601 (1933).
3. Edenfield v. Lanier, 206 Ga. 696, 58 S.E.2d 188 (1950).
4. 205 Ga. 637, 54 S.E.2d 642 (1949).
5. 206 Ga. 836, 59 S.E.2d 244 (1950).
6. 206 Ga. 680, 58 S.E.2d 383 (1950).
7. GA. CODE § 85-1602 (1933).
8. 205 Ga. 859, 55 S.E.2d 351 (1949).

Bonds for Title

In *Heath v. Miller*[9] it was held that where the obligee in a bond for title made a tender of the purchase money and asked for a deed but also demanded that the obligor procure a deed from the heirs of a former owner, that the tender was not unconditional, and interest still ran on the purchase price—in this case for 37 years.

In *Mangum v. Jones*[10] it was held that a contract to sell land, in writing and signed by both parties, which is certain and for an adequate consideration and is capable of being performed will be specifically enforced as a matter of course. Such a contract is assignable, and the assignee may demand specific performance.

In *Bowles v. White, Admr.*[11] the court ordered specific performance of a valid contract for the testamentary disposition of an estate where the petitioner showed performance of the services he had promisd the decedent. The court said that he had the same perfect equity as one who had paid all of the purchase money under a contract of sale.

Westbrook v. Beusse[12] was a case where rescission of a contract was prayed, and the court held that no relief will be given to one who could have discovered, by inspection, the truth or falsity of a representation.

There are two exceptions to this general rule: (1) Where there is a confidential relation between the parties to the contract; (2) Where the party is prevented by artifice or fraud from making an inspection.

In none of these contractual cases is there any new law. The precedents are followed, and no special points of interest appear.

Churches

In *Stewart v. Jarriel*[13] the court held that an expelled member of a church has no interest in the church property, and excommunicated members whose names have been expunged from the church membership roll by valid action of the church cannot stand for and represent members of the church in an action to prevent the diversion of church property from its lawful uses.

This follows the general principle that a church governs itself, and its rules bind the members. If a member is expelled in accordance with church law, he has no further rights in the church, its property or its operation.

Covenants

It will be remembered that there are various types of recitals as to use of property that are placed in deeds: (1) A covenant—a promise to use the land conveyed for certain purposes; (2) A conveyance with a clause stating that the property will vest in another party if the land conveyed is used for other than certain specified purposes; and (3) A deed conveying land so long as it is used for certain purposes.

9. 205 Ga. 699, 54 S.E.2d 432 (1949).
10. 205 Ga. 661, 54 S.E.2d 603 (1949).
11. 206 Ga. 433, 57 S.E.2d 547 (1950).
12. 79 Ga. App. 654, 54 S.E.2d 693 (1949).
13. 206 Ga. 856, 59 S.E.2d 368 (1950).

The consequences of a breach are: (1) Damages; (2) Right to sue in ejectment; and (3) Title fails in the grantee.

In *Jackson v. Rogers*[14] the court held that a conveyance by *A* to *X* Railroad "for railroad purposes" gave the railroad a fee simple title to the land conveyed and not an easement for a railroad line. This falls under class (1) above.

Dedication to Public Uses

The usual rule as to dedication is that the land owner must give, and the public authorities must accept the land given. The acceptance must be (1) Express, by proper legislative action or (2) Implied, by construction, repair and use of the land dedicated for the purpose of dedication.

Parol License.—Where lands of a city are dedicated to a particular public use, and citizens contribute money for necessary improvements to effectuate such a use, the city may not at will revoke the dedication or license.[15]

Public Streets and Alleys.—Acceptance of a street or alley need not be express. If it be used and worked by the public for such a length of time that the public accommodation and private rights might be materially affected by the interruption of the enjoyment, the dedication is complete.[16]

Dedication and use by the public will not, of themselves, make a street or alley a public way so as to charge the municipality with the burden of repairs and maintenance, and liability for injuries sustained by reason of the defective condition of such a way, unless the dedication is accepted by the proper municipal officials or there is evidence of recognition of such way as a public one.

An encroachment upon a public alley or street of a municipality is a public nuisance and one who is specially injured thereby may proceed in his own name to enjoin such encroachment.

Dedication by Governmental Unit.—The state or a political subdivision thereof may dedicate lands owned by it to a particular public use.[17]

Land may be dedicated for a particular public use with a reservation by the proprietor of a right to use it for a specified purpose not inconsistent with the legal character of the dedication.

Adverse Possession.—Where there is no intention to dedicate a way, but the public has taken possession of the property of an individual, and used and maintained it as a highway for a period of 20 years or more, a highway by prescription becomes complete.[18]

Where there is an intent to dedicate, the maintenance of a way for a less time will bring into existence a completed highway by dedication.

Intention to dedicate may be inferred from acquiescence by the owner in the use of his land by the public, if the use be of such character as to indicate clearly that the public accepted the dedication to public use.

These cases set forth the usual principles and have no outstandingly peculiar set of facts.

14. 205 Ga. 581, 54 S.E.2d 132 (1949).
15. Tillman v. Mayor of Athens, 206 Ga. 289, 56 S.E.2d 624 (1949).
16. Maddox v. Willis, 205 Ga. 596, 54 S.E.2d 632 (1949).
17. City of Abbeville v. Jay, 205 Ga. 743, 55 S.E.2d 129 (1949).
18. Atlantic Coast Line v. Sweatman, 81 Ga. App. 269, 58 S.E.2d 553 (1950).

DEEDS

Cancellation.—One of the decisions that offered an extension of views formerly set forth was *Smith v. Merck.*[19] The plaintiff's petition alleged that a confidential relation existed between the parties, that the deed in question was executed as a result of false and fraudulent representations by the defendant, that by reason of poverty the plaintiff was unable to return or offer to return any benefits she might have received, and that she offered to do equity. She sought to have the court cancel the deed on the ground of the misrepresentations. This petition, the court held, was sufficient to withstand a general demurrer.

Where a person without mental capacity executes a deed, and he remains without mental capacity until suit is brought, and the grantee is still in possession, an action for cancellation will lie.[20]

Conditions Subsequent.—In *Tabor v. Gilmer County*[21] the grantor conveyed land to a county in order that it might erect a courthouse. The deed provided that if the county failed to do so, the title would revert to *X* corporation. The court held that a breach of the condition subsequent would not cause the title to be re-invested in the grantor, but it would revert to the corporation as provided in the deed.

Covenants.—In *Jackson v. Rogers*[22] the conveyance read: "All the land contained within 100 feet in width on each side of its tract or roadbed or any portion of the lot of land on which I live, or which belongs to me bounded by Z,H,J,JBB and others, for railroad purposes." This conveyed a fee simple estate and not a mere easement for railroad purposes.

In *Gordon v. Whittle*[23] *A* deeded land to *X*, the deed reciting "for a park and recreation center, and to be forever maintained as such for the benefit of residential and philanthropic purposes of party of second part and upon condition that party of second part shall lay out and dedicate x-x-x lots." It was held that as there were no words of defeasance, this was a covenant and not a condition, and the remedy for a breach of it is by suit for damages and not for a forfeiture of the estate for condition broken. This case also properly falls into the section on dedication above.

Fee Simple Defeasible.—In *Jenkins v. Shuften*[24] the court said that a fee simple defeasible estate with a legal executory limitation is created in this state when a testator gives land to one in fee simple, but subsequently provides in his will that in case a certain event does or does not happen that the estate will go to another.

Description.—Where a deed conveying a tract of land locates the boundaries by physical monuments, natural or artificial (such as public roads), and by courses and distances, and there is a discrepancy between the monuments and the courses and distances, the locations by monuments will prevail.[25]

A description, "one acre, more or less, bounded on the North by

19. 206 Ga. 361, 57 S.E.2d 326 (1950).
20. Burton v. Hart, 206 Ga. 87, 55 S.E.2d 594 (1949).
21. 205 Ga. 439, 53 S.E.2d 915 (1949).
22. 205 Ga. 581, 54 S.E.2d 132 (1949).
23. 206 Ga. 339, 57 S.E.2d 169 (1950).
24. 206 Ga. 315, 57 S.E.2d 283 (1950).
25. Barrett v. Dodd, 206 Ga. 840, 59 S.E.2d 395 (1950).

Washington Public Road, now State Route 104; East by lands formerly R. R. Hunter; South and West by lands formerly M. H. Hunter, now C. T. Deese," C. T Deese being the defendant, is too vague to support a writ of possession if the plaintiff should recover. But, as the description also contains a reference to another deed, the description in that deed being sufficient, it is adequate to withstand a general demurrer.[26]

In *Lankford v. Pope*[27] the description read: "All that certain tract of land situated . . . in the Sixth District of Coffee County, in the town of Douglas, bounded North by B. Peterson, West by Walnut Street, South and East by lands of B. Peterson, being part of Land Lot 193. Said piece of land designated by stakes and containing one-half (½) acre." B. P. Peterson was the grantor in the deed. This description was held good because that which was at one time made known as between the parties, by the use of stakes, is a proper subject-matter for extrinsic evidence. Extrinsic evidence may supply the location and shape of this particular tract of land.

In this case the doctrine of parol proof is carried very far. The only key to the property is some stakes. Apparently, the location of the stakes was known only to the grantor and the grantee. The sheriff with the aid of parol evidence could have located the property, but if the parol evidence was that of the parties to the case it is somewhat confusing. However, a jury verdict in favor of the contentions of either party would settle that issue.

The description in *Homeyer v. Towler*[28] read: "In Dacula, Gwinnett County, Georgia, being the property on the Southeast corner of the junction of the Lawrenceville-Athens paved road and the Dacula to Monroe Road, and including a drive-in filling station and store building fronting on the Lawrenceville to Athens paved road." The description was good and included all land owned by the grantor at the Southeast corner of the named cross roads.

Fraudulent Conveyances.—In *Taylor v. Gates*[29] the facts were that the defendant conveyed land to his mother on July 14, 1948. A suit was filed against him on a cause of action which arose August 16, 1948, and judgment was entered against him. The plaintiff moved to set aside the deed but was non suited.

Mistake

In *Scurry v. Cook*[30] the court said that a mutual mistake is one which is reciprocal and common to all of the parties to the transaction. Undue influence which will annul a deed must be of that potency which substitutes the will of another party for that of the donor.

Transactions Between Husband and Wife

In *Pharr v. Pharr*[31] the court held that even if a husband is solvent still,

26. Kauffman v. Deese, 205 Ga. 841 (2a), 55 S.E.2d 358 (1949).
27. 206 Ga. 430, 57 S.E.2d 538 (1950).
28. 80 Ga. App. 716, 57 S.E.2d 288 (1950).
29. 206 Ga. 880, 59 S.E.2d 365 (1950).
30. 206 Ga. 876, 59 S.E.2d 371 (1950).
31. 206 Ga. 354, 57 S.E.2d 177 (1950).

if, by voluntary conveyance, he should deprive himself of all property which would be subject to legal process, such a conveyance, as to creditors, is prima facie fraudulent and the burden is on the donor to show that it is not.

The court further held in the *Pharr* case[32] that whether a conveyance is, in fact, voluntary depends upon the intention of the parties, which is to be ascertained from the facts and circumstances at the time of its execution.

These cases again show no departure from well-traveled paths.

EJECTMENT

Title.—In *Abbeville v. Jay*[33] the court said that, under the common sense rule, the grantee in a deed is not at liberty to claim title under the deed and to deny it at the same time .

Adverse Possession—Good Faith.—In *Krasnik v. Crosswell*[34] the court said that the sole question in such an adverse possession case was whether or not the defendant in good faith claimed the right to occupy the premises in dispute.

And in *Mincey v. Anderson*[35] the court said that where there is evidence to negative good faith on the part of a plaintiff claiming title by prescription and some evidence to show adverse possession by the defendant, it is error to direct a verdict for the plaintiff.

Adverse Possession—Color of Title.—In *Mincey v. Anderson*[36] the court held that a person claiming under an unrecorded deed may have constructive possession of lands and may, under provisions of the Code,[37] acquire a prescriptive title to all lands which are covered by the deed and are contiguous by having actual possession of a part thereof for seven years.

Adverse Possession—Under Illegal Foreclosure.—In *Blue Ridge Apt. Co., Inc. v. Telfair Stockston & Co.*[38] the court said that where the grantee, in a security deed, is in possession of property under a sheriff's deed made in pursuance of an alleged illegal sale, such deed, being color of title, will bar the grantor in the security deed in seven years if acquiesced in by him for that length of time.

The court also held that one, who in good faith acquires the legal title to land by a deed to secure debt from a grantor who is the holder of the record title and who is also in possession of the property, will be protected from one who asserts a right hostile to the record and to the possession.

Estoppel.—In a case where a vendor pointed out certain lines to the prospective vendee, but made him a deed to less land, it was held that estoppel by such a verbal representation conveys no title to land not described in the deed.[39]

---

32. *Ibid.*
33. 205 Ga. 743, 55 S.E.2d 129 (1949).
34. 80 Ga. App. 134, 55 S.E.2d 381 (1949).
35. 206 Ga. 572, 57 S.E.2d 922 (1950).
36. *Ibid.*
37. GA. CODE §§ 85-401, 85-402 (1933).
38. 205 Ga. 552, 54 S.E.2d 608 (1949).
39. Hicks v. Smith, 205 Ga. 614, 54 S.E.2d 407 (1949).

Pleading.—In *Bridges v. Brackett*[40] the court said that where the allegations of title are in the conjunctive, and title is alleged by (a) paper title and (b) by 20 years adverse possession, and the allegations as to paper title are insufficient, a general demurrer will not be sustained, although a special demurrer as to multifariousness should be sustained.

The consent rule[41] applies where there is an allegation of lease, entry and ouster or what is considered equivalent thereto in a statutory form of action for land. It can hardly be contended that an action of ejectment will lie with no allegation of ouster (possession by defendant) or that the consent rule supplies such a failure of allegation.[42]

Prescription—Cemeteries.—In *Haslerig v. Watson*[43] the court said that where land is expressly dedicated for cemetery purposes by one exercising possession thereof at the time of dedication—even though the evidence fails to show in whom legal title to the property was vested at that time—and there has been open and notorious use of such property by the public as a cemetery for 50 years, and the location of several hundred graves thereon, and a subsequent owner of the fee of the surrounding property makes no objection to such use for a period of approximately 28 years, an implied dedication by such owner will be conclusively presumed, and he cannot appropriate it to his own use or interfere with the use thereof for cemetery purposes.

Proof.—In *Flynt v. Dumas*[44] it was said that where a party introduces no written evidence of title in an ejectment suit, and the evidence fails to make out 20 years adverse possession under claim of right, a directed verdict is proper.

Setting Off Improvements.—In *Bowles v. White, Admr.*[45] it was held that where one erects valuable improvements upon land of which he is not in bona fide possession under an adverse claim of title, he may not avail himself of the beneficial provisions of Code Section 33-107.

Statute of Limitations.—In *Fowler v. Latham*[46] the court held that in suits to recover land there is no statute of limitations in this state, title by prescription having been substituted for such statutes.

Private Ways

Implied Reservation of an Easement.—Where the plaintiff had acquired a title by prescription for a private way over an adjoining lot and then acquired title to the adjoining lot, but thinking it was on his original lot, he lost all right in the easement, for the doctrine of implied reservation of an easement by the grantor of the land has not been adopted in this state.[47]

Again we note that there is no case to excite remark. The "cemetery case" falls into the same type of cases as the dedication cases noted above in this article and, perhaps, should have been included under that healing.

40. 205 Ga. 637, 54 S.E.2d 642 (1949).
41. Ga. Code § 33-111 (1933).
42. Kauffman v. Deese, 205 Ga. 841 (3a), 55 S.E.2d 358 (1949).
43. 205 Ga. 668, 54 S.E.2d 413 (1949).
44. 205 Ga. 702, 54 S.E.2d 429 (1949).
45. 206 Ga. 343, 57 S.E.2d 187 (1950).
46. 206 Ga. 245, 56 S.E.2d 272 (1949).
47. Srochi v. Postell, 206 Ga. 59, 55 S.E.2d 603 (1949).

Possession—Notice By.—In *Taylor v. Perdue*[48] it was held that one buying from another will be charged with notice of an unrecorded deed held by a person in possession.

Power of Disposition

In *Jenkins v. Shuften*[49] the court held that a power of disposition contained in a will, and the mode of its exercise when the latter will have the effect of cutting out executory devisees, will be strictly construed; and when such power of disposition must be exercised by the holder of a defeasable fee during his lifetime, he is not authorized to dispose of the property by will, but only by a conveyance inter vivos.

Taxes

Levy of Fi. Fa. Against Life Tenant.—In *Townsend v. McIntosh*[50] the court held that, "Under the decisions of this court, where nothing further appears, a purchaser at a sale under a tax execution in personam against a life tenant acquires only the life estate, but where . . . it further appears that the life tenant is in possession, that the whole property was levied upon, and that the execution embraces only the taxes upon the specific property, the purchaser acquires title to the fee, and the whole property, including the remainder estate, as well as the life estate, passes."

Here, at last we come to a decision of which the writer is critical. The effect of this decision is to make it possible for a remainderman to lose his property through the fault of the life tenant. That fault may be deliberate, although proof of it cannot be made. Conversely, it puts on the remainderman the liability to see that taxes on the property are paid, although it does not give him the income with which to pay them.

However, as the law is as it is, lawyers should warn clients holding remainder interests to do one of three things: (1) Return the remainder interest for taxation (if that is possible); (2) Pay the taxes if the life tenant fails to do so; or (3) Return and pay the taxes himself.

The decision puts life tenants and remaindermen on the same basis as (1) holders of bonds for title and holders of the fee (2) holders of equities of redemption and holders of loan deeds, and (3) holders of fee simples and holders of mortgages. In all of these cases the land is assessed against the occupant and all of the title may be sold for taxes against the occupant in possession.

In case of loan deeds the holder may register his loan deed under Code Sections 92-7408 and 92-7410, and a sale of the fee will not bind him until notice is given him.

Trespass

Timber-Cutting.—The cutting of timber may be enjoined even though the defendant is solvent, the damages reparable, and the plaintiff does not have

48. 206 Ga. 764 (3), 58 S.E.2d 902 (1950).
49. 206 Ga. 315, 57 S.E.2d 283 (1950).
50. 205 Ga. 643, 54 S.E.2d 592 (1950).

perfect title, if there are other circumstances which, in the discretion of the court, render the interposition of the writ necessary.[51]

The measure of damages for timber cut and carried away where the defendant is a wilful trespasser is the full value of the property at the time and place of demand or suit without deduction for his labor or expense; but where the defendant is an unintentional or innocent trespasser, or innocent purchaser from such trespasser, it is the value at the time of conversion, less the value he or his vendor added to the property.[52]

Joint Trespassers.—In an action against joint trespassers there may be a recovery against only one of the defendants, if that defendant resides within the jurisdiction of the court.[53]

Vendor and Purchaser

Measure of Damages.—The true measure of damages in a suit brought by a vendor against the purchaser for the latter's refusal to perform his part of an agreement to buy land was held, in *Shives v. Young*,[54] to be the difference between the contract price and the market value of the land at the time of the breach.

Specific Performance.—If, after notice that another has made a contract for the purchase of land, a third person cuts in, buys it and takes a conveyance, such a person stands in the place of his vendor; and a court of equity, if it would decree a specific performance of the contract against the latter, will render a like decree against the former.[55]

Year's Support

When all of the beneficiaries of a year's support cease to exist as such, any unconsumed portion of the property set apart belongs to them or their heirs at law in common.[56]

Waters

Pollution.—Several lower riparian landowners have such a community of interest that they may join in a petition to restrain an upper proprietor or a stranger from adulterating the water.[57]

Profits Injunction.—Injuring a fishing privilege or rendering land less valuable for pasturage, by polluting the water of a non-navigable stream gives rise to a cause of action of injunction for continuing trespass.[58]

51. Bridges v. Brackett, 205 Ga. 637, 54 S.E.2d 642 (1949).
52. Coleman v. Garrison, 80 Ga. App. 328, 56 S.E.2d 144 (1949).
53. Minor v. Fincher, 206 Ga. 721, 58 S.E.2d 389 (1950).
54. 81 Ga. App. 30, 57 S.E.2d 874 (1950).
55. Finney v. Blalock, 206 Ga. 655 (1), 58 S.E.2d 429 (1950).
56. Mixon v. Sumner, 205 Ga. 579, 54 S.E.2d 411 (1949).
57. Cairo Pickle Co. v. Muggridge, 206 Ga. 80, 55 S.E.2d 562 (1949).
58. *Ibid.*