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Henry S. Barnes

REAL PROPERTY

By HENRY S. BARNES*

A goodly number of cases involving some phase of real property law reached the appellate courts during the year, however, the great majority turned on a question of pleading or practice rather than of real property law. Since a detailed analysis and discussion of all the cases will not be possible, only those decisions which indicate the establishment of new, or the growth, extension, or clarification of existing, principles will be mentioned.

Williams v. Thomas County[1] is in line with the modern doctrine that any present interest in land is alienable. A possibility of reverter or a right of entry for breach of a condition subsequent has always been thought of as a present interest in land. At the common law an attempt to convey to a stranger a right of entry for breach of a condition subsequent, before the breach occurred, destroyed the right and left the estate subject to the condition free and clear of the encumbrance. The doctrine was based primarily on the inability of the owner of the right to make livery of seisin. However, such an interest could, at all times, be released to the *terre* tenant. Since livery of seisin is no longer necessary, there is no reason why such an interest should not be passed by deed or will. And since our courts make little or no distinction, so far as alienability is concerned, between a possibility of reverter and a right of entry upon condition broken, the same rule is applied to both interests. This case is logically and historically sound because the conveyance was to the *terre* tenant.

Where one grants a life estate to another with a remainder to grantee's children and by the same instrument reserves to himself a life estate, he creates an interest in the children that cannot become vested in possession until the physical death of the parent. Therefore, a destruction of the life estate during the lifetime of the life tenant will not entitle the remainderman to maintain a suit for possession of the land. It does not matter whether we call the interest of the remainderman vested subject to being divested or contingent. The problem of whether the interest of unborn remaindermen could have been bound by the judgment in a suit to cancel the deed creating the interest was not discussed because under any view the suit was prematurely brought.[2]

A devise of real estate to D for life and at her death to such of her children as may survive her and to the representatives of any child who may be dead, "these latter to take in place of deceased parents," created a defeasible remainder in fee in a child and upon the death of a child during the life of the life tenant, his child who survived the life tenant took an absolute fee. It was the intention of the testator that the child of a deceased remainderman should take by substitution and not by inheritance, therefore,

*Professor of Law, Walter F. George School of Law, Mercer University; B.B.S., 1920, North Georgia Agricultural College; A.B., 1928, LL.B., 1928, A.M., 1933, Mercer University; LL.M., 1938, Duke University; Member Georgia Bar Association.

1. 208 Ga. 103, 65 S.E.2d 412 (1951).
2. Smith v. Fowler, 208 Ga. 76, 65 S.E.2d 156 (1951).

a vendee of a child who died in the lifetime of the life tenant took nothing under his deed.[3]

Where one in possession of lands under a bond for title with a part of the purchase money paid dies leaving a minor heir, his equitable estate in the land passes to his heir who may, within a reasonable time after reaching his majority, recover the land in an equitable action. The primary thought in the case is that the interest in the land is inheritable in the same manner as a legal estate. Nevertheless, as a condition precedent to maintaining suit, the heir must allege and prove that there was no administration or, if there was one, that the administrator assented to his bringing suit.[4]

Bail trover may be maintained to recover a valid deed which is in the wrongful possession of another, but it is not the proper action in which to litigate the question of whether the deed was legally delivered. Since delivery of a deed is essential to its validity, a controversy as to whether it was delivered is one involving title to land and must be brought in the superior court of the county in which the land lies.[5]

Where plaintiff's right to recover depends upon circumstantial evidence that a deed was not delivered, he is not entitled to prevail against positive, unimpeached testimony, not inconsistent with the circumstantial evidence, that the deed was delivered to the grantee. It is not error for the court to direct a verdict for the defendant.[6]

There is a well-known doctrine that a great inadequacy of consideration, whether in goods or services, coupled with great disparity in mental capacity of the grantor and grantee is sufficient ground for the cancellation of a deed. If the two elements are present it is not necessary to allege or prove actual fraud or that the grantor did not have mental capacity to execute a deed.[7]

An agreement to convey land must describe it with the same degree of certainty as is required in the description in a deed. A contract headed, "Georgia, Bartow County," and describing the premises as "the brick store building, known as the old Post Office Building," creates a presumption that the land is in the county and furnishes the key to its description. Under such circumstances, parol evidence is admissible to identify the land intended to be conveyed.[8]

During the year a number of boundary disputes reached the courts in one form of proceeding or another. It was held that the duty of processioners was to locate the lines as they actually existed, not as they ought to have been laid off, keeping in view the rules governing disputed land lines as prescribed by statute as well as by statutory provisions relating to adverse possession.[9] When the disputes reached the courts it was held to be the duty of the jury to find the location of the line on the ground. To aid the jury in reaching a just conclusion, it was held that the jury was not limited to the description contained in the deeds of the parties but should consider any evidence relative to the actual location, such as whether the

3. Shedden v. Donaldson, 207 Ga. 77, 60 S.E.2d 158 (1950).
4. Gay v. Radford, 207 Ga. 38, 59 S.E.2d 915 (1950).
5. Breen v. Barfield, 82 Ga. App. 204, 60 S.E.2d 513 (1950).
6. Wood v. Keen, 207 Ga. 317, 61 S.E.2d 418 (1950).
7. Fuller v. Stone, 207 Ga. 355, 61 S.E.2d 467 (1950).
8. Faulkner v. McKelvey, 207 Ga. 354, 61 S.E.2d 478 (1950).
9. Palmer v. Jackson, 82 Ga. App. 702, 62 S.E.2d 366 (1950); Ledford v. Hill, 82 Ga. App. 299, 60 S.E.2d 555 (1950).

parties have acquiesced in an actual line for seven years, whether either party may have acquired title by prescription, etc.[10] Where the line between coterminous owners is unascertained, indefinite, or disputed, the owners may by parol agreement duly executed establish the line, and the line thus established will control their deeds. The agreement that the line is at a certain place on the face of the earth followed by possession, or otherwise duly executed, is an expression of the meaning placed on their deeds by the parties and is binding on them and their successors in interest.[11]

In an equitable action for partition of land involving a border line dispute, the owner of an undivided interest in adjoining land is a proper party defendant.[12] Equity has jurisdiction in cases of partition where the remedy at law is insufficient as where a cotenant in possession has rented the land and failed to account.[13] Prescription will not run against a cotenant out of possession in favor of the one in possession until he does some positive act that is notice to the other that he is holding adversely to him.

There is a presumption of fact, where an alteration appears on a deed, that it was made before delivery and the burden of proving that the alteration was made after delivery rests on the person who alleges it to be made after delivery.[14]

A plaintiff in ejectment must recover on the strength of his own title. If the parties hold under a common grantor, it is not necessary to trace title back of the common source, but the burden is on the plaintiff to show that he has a better title than the defendant. If the parties do not hold under a common grantor, plaintiff carries the burden of showing that his title is stronger and he may do it by showing that his title is derived from the state, or by prescription, or by any other method known to the law.[15]

In *Williams v. O'Connor*[16] the court interprets the Act of 1941,[17] which provides that where the debt secured by a deed to secure debt is more than twenty years past due title automatically reverts to the grantor, to mean that any right to foreclose, to sell under such deed, or to sue on the debt is barred. The case may be put in that group in which the statute of limitations amounts to a conveyance by operation of law in so far as title to the land is concerned and in the group in which the statute is a bar to the right to sue on the debt and not merely a bar to the remedy. The statute as interpreted effectively removes a common encumbrance from the title which results from the failure of the grantee to deliver the deed with a proper order of cancellation thereon or from the failure of the grantor to have the cancellation entered of record.

If a plat of a tract of land shows a passageway from a public road across a lot to another which does not touch the road and the lots are conveyed to different persons by deeds containing a reference to the plat, an easement

10. Ledford v. Hill, *supra* note 9; Watts v. Pettigrew, 207 Ga. 654, 63 S.E.2d 897 (1951); Davis v. Wight, 207 Ga. 590, 63 S.E.2d 405 (1951); Morgan v. Reeves, 84 Ga. App. 41, 65 S.E.2d 453 (1951).
11. Bennett v. Perry, 207 Ga. 331, 61 S.E.2d 501 (1950); Callaway v. Armour, 207 Ga. 229, 60 S.E.2d 367 (1950).
12. Smith v. Willoughby, 207 Ga. 91, 60 S.E.2d 155 (1950).
13. Ballenger v. Houston, 207 Ga. 438, 62 S.E.2d 189 (1950).
14. Spence v. Spence, 208 Ga. 1, 64 S.E.2d 446 (1951).
15. Bridges v. McGalliard, 207 Ga. 422, 61 S.E.2d 922 (1950).
16. 208 Ga. 39, 64 S.E.2d 890 (1951).
17. Ga. Laws, 1941, pp. 487-489, GA. CODE ANN. § 67-1308 (Supp. 1947).

is created across the front lot for the benefit of the rear lot. Since a party is bound by recitals contained in the deed under which he holds, the purchaser of the front lot is estopped to deny the existence of the way.[18] A continuing obstruction of such a way by the servient owner may be enjoined on the ground that equity will take jurisdiction where the remedy at law is inadequate or where it is necessary to avoid a multiplicity of suits.[19]

In *City of Atlanta v. Kenny*,[20] the court held that the provision of the State Constitution[21] to the effect that, " . . . Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid," required compensation for damage to adjoining property which resulted from digging ditches alongside the property to accomplish a governmental function. It will be noted that the injury to the adjoining property was physical. The doctrine of the case makes it easy to fix liability because the only facts that must be proved are that the work being done was in the exercise of a governmental function, that the damage occurred as a result of the work, and the amount of damage. The measure of damages is the difference in the market value of the injured property before and after the injury.

If it is uncertain whether the grantor, at the date of the deed, had the mental capacity to make a valid conveyance the grantee is entitled to a declaratory judgment setting forth the rights of the parties. Neither the fact that the grantor may never assert a claim to the land nor that the only question involved, the sanity of the grantor, will foreclose the grantee's right. This method enables an owner to clear the title to land without exercising the "patient politeness" so common to real estate law.[22] Where a claimant to title to land is cutting timber on the land, another claimant who is in possession of the land is entitled to maintain an action for a declaratory judgment and for injunction in aid of his action. The title being in issue, venue is in the county where the land lies.[23]

Where plaintiff's title to a tract of land is purportedly acquired as a year's support for herself and minor children and where the evidence shows that the description of the land in the proceedings to set it aside is wholly insufficient, she is not entitled to have a deed conveying the land to her deceased husband reformed in equity on the ground of mutual mistake.[24] If land is set aside as a year's support for the widow and minor child of the deceased owner, the interest that the minor takes in the land is not divested upon his reaching majority. At the widow's death the child is entitled to his proportionate part of what is left while the widow's share passes to her heir at law.[25]

Several cases involving the rights of the owner of cemetery lots were before the courts during the year. It was held that the living owner of a lot, or one having a burial easement therein, might maintain an action of trespass against the owner of the cemetery for the removal of plants and

18. Thompson v. Hutchins, 207 Ga. 226, 60 S.E.2d 455 (1950).
19. Jones v. Mauldin, 208 Ga. 14, 64 S.E.2d 452 (1951).
20. 83 Ga. App. 823, 64 S.E.2d 912 (1951).
21. Art. I, § 3, ¶ 1, GA. CODE ANN. § 2-301 (1948 Rev.)
22. Bond v. Ray, 83 Ga. App. 817, 65 S.E.2d 30 (1951).
23. Shaw v. Crawford, 207 Ga. 67, 60 S.E.2d 143 (1950).
24. Gilbert v. Fowler, 207 Ga. 720, 64 S.E.2d 55 (1951).
25. Ennis v. Ennis, 207 Ga. 665, 63 S.E.2d 887 (1951).

flowers placed on the lot, provided the right to place plants and flowers on the lot was not restricted by his deed. It should be noted that the court tacitly recognizes a right of action in the heirs of a person buried in such lot by pointing out that these cases do not fall within that class.[26] Where the lots are conveyed by deeds containing recitals of rules and regulations as to the rights of the parties, such are binding on the grantees and the owner who exercises a certain discretion and acts in good faith and does not violate any term of a conveyance will not be interfered with by the courts.[27]

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26. West View Corp. v. Alexander, 83 Ga. App. 810, 65 S.E.2d 38 (1951).
27. West View Corp. v. Alston, 208 Ga. 122, 65 S.E.2d 406 (1951).