REAL PROPERTY

By HENRY S. BARNES*

The 1952 session of the legislature enacted several laws that were designed to more nearly fit real property law to present economic conditions. A detailed discussion of each Act would be out of place in a paper so short as this, therefore, only a brief statement of the important enactments will be made.

Title 36 of the Georgia Code was amended by providing an additional procedure for condemnation of property by municipalities and counties having a population of more than 250,000.[1] The Act is cumulative and is designed to provide a simpler method for condemning land for public use by qualified cities and counties. The outstanding change in the law is the provision for a special master instead of assessors to value the property condemned. Provisions are made for jury trial and appeal.

Code section 83-201 was amended by adding a provision that a "company of persons or corporation chartered under the laws of any State of the United States" might acquire the easements allowed by the old law and adding thereto "roadway, easements for pipelines or power lines."[2] The section as amended makes it easier for persons engaged in the mining industry to acquire all easements necessary for the proper exploitation of their mineral resources.

Authority was granted to the director of the Division of State Parks, Historical Sites and Monuments of the Department of Natural resources to sublease, upon approval of the Governor, to any individual, county, municipality, public authority or other subdivision of the state, any property which the State of Georgia has leased from the United States Government or any agency or department thereof, under the same terms and conditions as those contained in the main lease.[3]

The legislature extended and clarified the riparian rights of the owner of land on both sides of a tidal stream or estuary for its entire length by creating in such owner the exclusive right to take shell fish from such stream. The statute is designed to foster the development of the shell fish industry on the coast.[4]

An amendment to Code section 22-1504, as amended,[5] extends the power of corporations to own land in Georgia. The Act was intended to further the industrial development of the state.[6]

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1. Ga. Laws 1952, p. 29.
2. Ga. Laws 1952, p. 38.
3. Ga. Laws 1952, p. 86.
4. Ga. Laws 1952, p. 247.
5. Ga. Laws 1945, p. 152, GA. CODE ANN. § 22-1504 (Supp. 1951).
6. Ga. Laws 1952, p. 322.

A considerable number of cases involving one phase or another of real property law reached the appellate courts during the year. None of the cases involved a new principle of law and few of them should have been appealed. A brief discussion of the most important cases will follow.

Since a cotenant in possession is presumed to hold for all, the statute of limitations does not begin to run in his favor until actual ouster, exclusive possession after demand, or express notice that he is holding adversely. The tenant in possession must do some act that will put his cotenant on notice that he is now holding adversely to him. The occupation of the premises and the retention of the rents and profits will not necessarily amount to an ouster unless a demand is made for an accounting or possession and a refusal by the occupying tenant to account or to surrender possession.[7]

In *Pruitt v. Lynch*[8] it was held that where there is a contest between adjoining landowners as to which of two lines is the boundary, and evidence tending to show that one of the parties held the disputed strip adversely or that the parties have acquiesced in the location of the line at a particular place for seven years has been admitted without objection, it is not error for the judge to charge the law of prescription or location of a line by acquiescence because such evidence could have been authorized by amending the pleadings.

In a processioning proceding the jury may find that the line marked by the processioners is the true line, that the line so marked is not the true line, or that the line contended for by the protestant is the true line. The evidence may support either the contention of the applicant or the protestant. The protestant may acquire title to the disputed strip of land by prescription. A line located on the ground by coterminous owners may be good.[9]

The sole plaintiff in an ejectment action must be either a natural or artificial person recognized by law as capable of suing. Therefore, a county board of education cannot be the sole plaintiff because it has not been given the power to sue. The legislature should remedy this defect in the law by granting to county boards of education the power to sue and to be sued.[10]

To maintain an action in ejectment the description of the land must be set out in the petition with sufficient certainty to enable the sheriff to put the winning plaintiff in possession under a writ based on that description.[11] Where the land is described by metes and bounds with reference to a stated starting point, the location of the point must be certain or capable of being rendered certain by extrinsic evidence. A defective description in the petition may be taken advantage of by demurrer.

A petition in ejectment is generally sufficient if it contains an averment that plaintiff is entitled to possession and that defendant wrongfully or

7. Chambers v. Schall, 209 Ga. 18, 70 S.E.2d 463 (1952).
8. 208 Ga. 538, 67 S.E.2d 758 (1951).
9. Payne v. Green, 84 Ga. App. 689, 67 S.E.2d 195 (1951).
10. Parker v. Board of Education of Sumter County, 209 Ga. 5, 70 S.E.2d 369 (1952).
11. Callaway v. Armour, 208 Ga. 136, 65 S.E.2d 585 (1951).

unlawfully keeps him out.[12] So where plaintiff alleged that she had title from the heirs at law of the deceased owner and that the defendant held possession unlawfully the petition was good as against a general demurrer.

Where plaintiff in ejectment fails to make out a prima facie case, nonsuit and not a directed verdict in favor of defendant is proper, unless defendant introduces evidence to show that he has an interest in the land, or plaintiff's evidence shows that defendant has an interest.[13] This is an application of the principle that the plaintiff must recover on the strength of his own title.

In statutory ejectment the defendant need not expressly admit possession of the land in order to defend but the common law consent rule, as extended by the superior court rule, charges the defendant with such admission and is deemed to be filed when defense is made.[14]

In *Godfrey v. City of Cochran*[15] the city sued a former employee for an accounting and filed a *lis pendens*. Afterward the defendant conveyed real estate to one who was held to know of the pending proceedings. It was held that the petition could be amended by adding the grantee as a party defendant and praying that the conveyance be set aside as fraudulent. Equity having taken jurisdiction for one purpose, retains it for all purposes.

In a proceeding to cancel a deed, the petitioner alleged that she intended to make a will when she executed an instrument conveying land to the defendants and reserving a life estate in herself, and that she had retained possession of the instrument since its execution. These allegations amounted to an allegation that the instrument was never delivered. Since delivery of a deed is essential to its validity, the petition was good as against a general demurrer.[16]

Although the seller of certain lots knew that the Health Department had ruled that the lots were not suited to the installation of septic tanks and that the buyer was intending to build dwellings on the lots, his mere silence was not such fraud as would entitle the buyer to rescind the sale on the ground of fraud. Where the parties deal at arm's length, something more than mere silence concerning a fact that could be ascertained by either party is necessary to constitute such fraud that would prevent the petition from being dismissed on general demurrer.[17]

The purchaser of land who had sufficient opportunity to examine the premises and failed to do so can not set up misrepresentation by the seller concerning the location of the land and the character of the soil as such a fraud that would authorize a court to set aside the sale. A man who deals in land must depend on his own judgment, unless the seller fraudulently prevents his examining the property.[18]

12. Hester v. Carroll, 208 Ga. 195, 65 S.E.2d 790 (1951).
13. Drake v. Wright, 208 Ga. 853, 69 S.E.2d 773 (1952).
14. Story v. Howell, 85 Ga. App. 661, 70 S.E.2d 29 (1952).
15. 208 Ga. 149, 65 S.E.2d 605 (1951).
16. Kirby v. Johnson, 208 Ga. 190, 65 S.E.2d 811 (1951).
17. Kirvin v. Blackett, 208 Ga. 178, 65 S.E.2d 791 (1951).
18. Edge v. Winters, 208 Ga. 196, 66 S.E.2d 75 (1951).

Where a contract for the sale of a house and lot is ambiguous as to the terms of payment but the buyer is willing to accept the property and pay the purchase price in cash, the seller can not set up the ambiguity in the sales contract as a defense to a suit for specific performance.[19]

In a partition proceeding by one heir at law against another, the defendant cannot show title in himself by merely showing that he is the grantee named in a deed from a third person without showing that his grantor had title to or possession of the land conveyed.[20] If a husband and wife occupy premises jointly as a home no prescription will run in favor of one against the other.

Equity will take jurisdiction of a suit for an accounting and partition brought by an ousted cotenant against another who ousts him and retains the rents and profits. If the property can not be equitably divided in kind, a sale will be decreed and the proceeds divided. The ousted cotenant may be given a lien on the other tenant's interest for the amount found due in the accounting, but this is not necessary.[21]

Where a deed, in the granting clause, conveys land in fee simple and following the description in the body of the deed there is a clause restraining alienation, the restraint is void and a fee simple passes. Free alienability has always been one of the essential elements of a fee simple and a restraint on alienation is repugnant to the estate granted and is void. A portion of the estate or an option, as between tenants in common, may be reserved or retained in the granting clause.[22]

In *Wills v. Pierce*[23] it was held that where a grantor conveyed land in fee simple, followed by a condition that the property be used by the grantee, his family and his heirs as a home, and upon abandonment of the property as a home to revert to the grantor's estate and pass by his will, conveyed a fee simple estate because such a condition in effect was a restraint on alienation, was repugnant to the estate granted, and was void. This situation should be distinguished from similar cases where conditions subsequent requiring use of the property for park, school, religious and like purposes were held valid.

The description of the land to be conveyed contained in an option must describe the land with the same degree of certainty as a deed of conveyance. The description in a deed is sufficiently certain if it contains a key by which the land can be definitely located by the aid of extrinsic evidence. The key to the description must be found in the deed itself, and not elsewhere.[24]

Plaintiff and defendant received title to adjoining lands from a common source. Plaintiff claimed that the line was farther north than that called for in the deeds, contending that he had acquired title to the disputed strip by adverse possession. The question as to whether plaintiff had held adversely to the line claimed by him was one for the jury. The jury had to

19. Blanton v. Williams, 209 Ga. 16, 70 S.E.2d 461 (1952).
20. Reiordan v. Turner, 208 Ga. 193, 66 S.E.2d 60 (1951).
21. Mills v. Williams, 208 Ga. 425, 67 S.E.2d 212 (1951).
22. Alderman v. Crenshaw, 84 Ga. App. 344, 66 S.E.2d 265 (1951).
23. 208 Ga. 417, 67 S.E.2d 239 (1951).
24. Smith v. Wilkinson, 208 Ga. 489, 67 S.E.2d 698 (1951).

decide where the claimed line was located and then to decide whether the plaintiff had held adversely to that line.[25]

In *Woods v. Brannen*[26] it was held that where possession was permissive in its inception it remained permissive until the person in possession did some act that would put the owner on notice that the holding was no longer under the owner but was in the holder's own right. No prescriptive title can be acquired until the full prescriptive period has run after notice to the owner that the holding is no longer permissive.

Only the true owner may maintain an action to quiet title to realty and his petition must allege facts to show title in him.[27] Prescription will not run in favor of the grantor in a security deed because he holds under his grantee. He must pay the debt before title revests in him. Hence, title is not revested in him by a discharge in bankruptcy.

In *Farlow v. Brown*[28] it was held that where, before the passage of the 1950 Act,[29] a wife conveyed land to her husband without an order of court and put him in possession, although, as to the grantor, the deed was void it would serve as color of title so that prescriptive title might be gained by seven years of adverse holding. Courts are very liberal in construing the term "color of title." Even a void tax deed may constitute color of title if it does not originate in fraud.[30]

In a condemnation proceeding there are two elements of damages: first, the market value of the land taken; second, the severance damage which is the decrease in the market value of the land not taken that was caused by the taking.[31] Consequential damage to the land not taken which was caused by negligent or improper construction of the improvement on the land taken must be recovered in a separate suit.

Where condemnation proceedings are pending in the superior court, an equitable petition filed by the land owner to restrain a construction company from proceeding with a state-aid road will not lie.[32] The condemnation proceeding is binding on the plaintiff until reversed or set aside, and cannot be attacked in a collateral suit by injunction against the contractor of the plaintiff in the condemnation proceeding.

The owner of a tract of land divided it into two lots and conveyed one by a deed providing for a street between the two, but the attempted dedication was not accepted until 1950, thirty years later. In 1938 the owner conveyed the other lot to the plaintiff who used the strip of land for a driveway until the grantee of the lot first conveyed constructed a street on the reserved strip. The court held that the grantee in the latter conveyance acquired an easement over the land and was entitled to damages for its destruction when the street was opened.[33]

25. Kerce v. Bell. 208 Ga. 131, 65 S.E.2d 592 (1951).
26. 208 Ga. 495, 67 S.E.2d 702 (1951).
27. Thomas v. Stedham, 208 Ga. 603, 68 S.E.2d 560 (1952).
28. 208 Ga. 646, 68 S.E.2d 903 (1952).
29. Ga. Laws 1950, p. 174.
30. Smith v. Powers, 208 Ga. 768, 69 S.E.2d 374 (1952).
31. McArthur v. State Highway Department, 85 Ga. App. 500, 69 S.E.2d 781 (1952).
32. McGreggor v. W. L. Florence Construction Company, 208 Ga. 176, 65 S.E.2d 809 (1951).
33. Mayor of Athens v. Gamma Delta Chapter House Corporation, 86 Ga. App. 53, 70 S.E.2d 621 (1952).