REAL PROPERTY

By HOMER C. EBERHARDT*

An even dozen of the Acts of the General Assembly affect, in some way or to some extent, the ownership of real property. If a trend can be detected in them, it is probably that of liberalizing the law and of eliminating some of the restrictions.

Authority was granted to the Department of Mines, Mining and Geology to prospect for water supplies for public and industrial use, to acquire sites therefor, and to lease supplies to cities and counties.[1] This, quite obviously, is in recognition that the problem of water supply is one that is ever increasing in Georgia — a problem arising from bad practices in land usage and from the tremendous increase in water consumption per capita.

The Rule against Perpetuities, as embodied in Code section 85-707, was altered so as to exempt therefrom property which is held in trust for pension plans and death or disability benefit plans for the benefit of employees of the creator of the trust.[2]

Recognizing the modern business practice of entering into long leases upon property and the advantages which may accrue in so doing, executors, administrators, guardians and trustees have been authorized to apply to the superior court and obtain an order permitting the leasing of property for periods beyond the termination of the administration, guardianship or trust.[3]

Code section 49-203 was amended to enable a guardian to apply to the superior court and obtain an order permitting the exchange of properties as is done for sales for reinvestment.[4]

Various factors, such as the destruction of courthouse records in a fire, have made it difficult, if not impossible in many instances to show a record title back to the original grant from the state, and the General Assembly has provided that prima facie case shall be made out in actions respecting title to lands upon showing good record title for a period of forty years — relieving the necessity of proving title back to the original grant from the state.[5]

---

*Member of the firm of Franklin, Eberhardt & Barham, Valdosta; B.S., 1925, Mercer University; LL.B., 1927, Mercer University; Member Valdosta, Georgia and American Bar Associations.

1. Ga. Laws 1953, p. 5.
2. Ga. Laws 1953, p. 42.
3. Ga. Laws 1953, p. 44.
4. Ga. Laws 1953, p. 389.
5. Ga. Laws 1953, p. 63.

To foster better hunting and fishing conditions in Georgia, Code section 45-402 was amended to permit the posting of lands and the registration of its posting by a lessee of the land or of the same rights thereon.[6]

Foreign trustees as to lands in Georgia are now required to designate a process agent, lodging the designation with the Secretary of State, or in default thereof said trustee may be served by serving the Secretary of State with a copy of the petition and process who will, in turn, send it to the foreign trustee by registered mail. All actions against the foreign trustee shall be brought in the county where the land, or some part thereof, lies. All provisions for the removal of resident trustees are made applicable to foreign trustees, and failure of a foreign trustee to comply with the Act makes it unlawful for him to exercise any control or dominion over the lands.[7]

There has been such general disregard of the prohibition against posting signs or advertisements within the right of way limits of public roads, as contained in Code section 95-2201, that the General Assembly has repealed this section entirely.[8]

The power and the duty of appointing processioners in all of the militia districts of each county is now vested in the ordinary by amendment of Code section 85-1604, and a more liberal compensation to the processioners has been made by amendment of Code section 85-1610.[9]

The strength of importance of restrictive covenants is perhaps lessened by the provision that the right of action accrues immediately upon the violation of the covenant, and that all actions for the breach must be instituted within two years after its accrual.[10]

Code section 92-3107 was amended to clarify the provisions relating to the installment sales of realty as affected by the income tax statutes.[11]

The State Highway Department was given broader power of condemnation in the acquisition of rights of way for state-aid roads, borrow pits, drainage ditches, wayside parks, and sites for maintenance sheds and barns, in the repealing of Code section 97-1715 and the enactment of a new section to take its place.[12]

DECISIONS

While there have been a number of cases which reached the appellate courts during the past year, most of them involved no more than the application of settled principles to variations of facts.

6. Ga. Laws 1953, p. 72.
7. Ga. Laws 1953, p. 178.
8. Ga. Laws 1953, p. 201.
9. Ga. Laws 1953, p. 202.
10. Ga. Laws 1953, p. 238.
11. Ga. Laws 1953, p. 287.
12. Ga. Laws 1953, p. 421.

Deeds.—In *Ethridge v. Boroughs,* the principle that where the name of the grantee is left blank in a deed it may not be completed without authority from the grantor is extended to the transfer of a security deed.[13]

Whether an instrument grants the fee simple title or merely an easement must be determined from the intention of the parties, as illustrated by the object, the subject matter, the purpose and the use to which the property is to be put, etc., and the fact that it includes a reverter upon the abandonment of the use as expressed in the instrument does not prevent the passage of a fee simple title.[14]

Restrictive Covenants.—The extent of construction against covenants which restrict the use of land is illustrated in *Jordan v. Orr,*[15] where there was a covenant against the erection of a duplex house on the property, and the court held that this was not violated by the conversion of a playroom or a utility room into a second kitchen, and further that the occupancy of the house by two families did not convert it into more than one residence. "We know of no reason why 'one residence' should not have more than one bedroom, one bathroom or one kitchen," observes the court.

Warranty.—The existence of an easement is such a constructive eviction as will authorize the maintenance of a suit for breach of a general warranty.[16] And the purchaser of timber, upon learning of the existence of adverse claims of title to the lands may sue for a breach of the general warranty without taking the hazard of proceeding with the cutting of the timber.[17]

Easements.—Where the land is described in the deed as being bounded by a street, alley or road, the grantor is estopped to deny its existence, and the grantee acquires such a right or interest in the way as to deprive the owner of the right to close it without his consent.[18]

The use of a way by express leave of the owner of the servient estate, however long, does not ripen into a right, but upon a sale of the servient estate, the license is revoked and use thereafter may ripen into a prescriptive easement — even though the new owner cooperates in keeping it in repair.[19]

Where the grantee is given the right to raise the water level by twelve

13. 209 Ga. 634, 74 S.E.2d 873 (1953).
14. Danielsville & Comer Telephone Company v. Sanders, 209 Ga. 144, 71 S.E.2d 226 (1952).
15. 209 Ga. 161, 71 S.E.2d 206 (1952).
16. State Mutual Insurance Co. v. McJenkin Ins. Co., 86 Ga. App. 442, 71 S.E.2d 670 (1952).
17. Abernathy v. Rylee, 209 Ga. 321, 72 S.E.2d 300 (1952).
18. Putnam v. Sewell, 86 Ga. App. 298, 71 S.E.2d 566 (1952).
19. Fine v. Strauss, 86 Ga. App. 354, 71 S.E.2d 580 (1952).

feet, thus flooding the lands above a dam, "if the grantee feels disposed to do so," a valid easement is granted to flood the lands.[20]

Dedication.—A municipality may not divert from the purpose for which property has been dedicated, except under the right of eminent domain, and hence streets may not be closed, sold, or encroached upon for other uses or purposes.[21]

Boundaries.—Although the location of boundary lines may be shown by the statements of a person to whom the witness was referred by a party to the suit, such evidence is hearsay and not admissible if the reference was by one not a party.[22] And where the parties to a suit agree that a survey shall be made and to abide the result thereof, they will be bound thereby.[23]

Since new lines are not to be established by processioners, the burden is on the applicant to establish his contention, and likewise upon the protestant to establish his contention as to the correctness of the line claimed.[24] But the processioners should respect the claim of one who has been in actual possession for more than seven years under a claim of right.[25]

The purchaser of timber who was not a party to processioning proceedings is not bound by the judgment therein.[26]

Lateral Support.—Notice must be given to the adjoining owner of one's intention to make an excavation, and ordinary care and reasonable precaution must be taken to prevent damage.[27]

Waters.—The owner of the higher lot may concentrate surface water which would normally flow onto the lower lot, and a building with a large roof area may so change the flow as to invade the rights of the lower owner.[28]

The upper riparian owner does not acquire a prescriptive right to maintain a nuisance — such as the adulteration of the water — nor is the lower owner estopped by his knowledge of the existence of the nuisance when he purchased.[29]

Mechanics and Materialman's Liens.—To be entitled to a lien for labor or for materials supplied in the improvement of realty, they must have been by or to some person having a contractual relationship with the owner of the property.[30]

20. Lewis v. Bowen, 209 Ga. 717, 75 S.E.2d 422 (1953).
21. Dunlap v. Tift, 209 Ga. 201, 71 S.E.2d 237 (1952).
22. Palmer v. Jackson, 86 Ga. App. 642, 72 S.E.2d 130 (1952).
23. Whaley v. Ellis, 86 Ga. App. 790, 72 S.E.2d 653 (1952).
24. Jarrard v. Wildes, 87 Ga. App. 30, 73 S.E.2d 116 (1952).
25. Milligan v. Hale, 88 Ga. App. 70, 76 S.E.2d 29 (1953).
26. Buie v. Waters, 209 Ga. 608, 74 S.E.2d 883 (1953).
27. Kolodkin v. Griffin, 87 Ga. App. 725, 75 S.E.2d 197 (1953).
28. Ringler v. Folson, 209 Ga. 549, 74 S.E.2d 661 (1953).
29. Roughton v. Thiele Kaolin Co., 209 Ga. 577, 74 S.E.2d 844 (1953).
30. Morgan v. May Realty Co., 86 Ga. App. 261, 71 S.E.2d 438 (1952).

Landlord and Tenant.—The relationship does not arise where one adjoining owner cultivates beyond the line claimed by the other unless the other's ownership is recognized, and hence a distress warrant will not lie for rents.[31]

The tenant has an adequate remedy at law against dispossessory proceedings, even when the lease provides for periodic renewals or extensions and although the premises have been sub-leased.[32]

Security Deeds.—The fact that the grantee in a security deed has advanced less than the recited consideration, or less than the amount of the debt which the deed purports to secure, does not invalidate it.[33] And the power of sale in a security deed which was executed prior to the Act of 1937, p. 481 (Code section 37-607) runs to the grantee only. The assignee may not exercise it.[34]

Bankruptcy.—The listing of a security deed in the bankruptcy schedules of the grantor does not affect the grantee's title, nor his right to foreclose after the grantor's discharge.[35]

Prescription — Statute of Limitations — Laches.—There is no rule as to what constitutes laches in suits to recover land, and title by prescription has been substituted for the Statute of Limitations.[36] Laches will not be imputed to one who is in peaceable possession because of his delay in resorting to equity to establish his title, and hence an action begun in 1952 to cancel an absolute deed that was given in 1914 to secure a debt which was paid in 1915 is not barred.[37]

Whether the cultivation of a turpentine farm for the statutory period is sufficient to form the basis of a prescriptive title is a question of fact, depending upon the character of the possession, the visible signs of occupancy, etc.[38]

Land Registration.—The decree in a land registration proceeding is binding upon all parties to that proceeding and a bar to any subsequent attempt by them to have adjudicated matters that were or could have been there determined.[39]

31. Myers v. Jackson, 87 Ga. App. 161, 73 S.E.2d 220 (1952).
32. Ehrlich v. Teague, 209 Ga. 164, 71 S.E.2d 232 (1952).
33. Potts v. McElroy, 209 Ga. 244, 71 S.E.2d 612 (1952).
34. Etheridge v. Boroughs, see n. 13 *supra*. See also McCook v. Kennedy, 146 Ga. 93, 90 S.E. 707 (1916) and Davis v. Buie, 197 Ga. 842, 30 S.E.2d 861 (1944). But assignee might exercise the power of sale if he acquired title to the land. See Woodward v. LaPorte, 181 Ga. 731, 184 S.E. 280 (1936).
35. See n. 33 *supra*.
36. Fletcher v. Fletcher, 209 Ga. 184, 71 S.E.2d 219 (1952).
37. Shirley v. Shirley, 209 Ga. 366, 72 S.E.2d 719 (1952).
38. Gee v. McDowell, 209 Ga. 265, 71 S.E.2d 532 (1952). See, also, Mitchell v. Crumming, 134 Ga. 383, 67 S.E. 1042 (1910).
39. Miller v. Turner, 209 Ga. 255, 71 S.E.2d 517 (1952). Although a reading of this decision discloses that the court says the question should be answered in the negative, it is obvious that such an answer is totally inconsistent with the judgment,

Brokers.—The owner of land is exempted from the provisions of the Act creating the Georgia Real Estate Commission, and he may sell his lands without obtaining any license, regardless of the fact that the lands may have been subdivided into twenty or more lots and irrespective of the existence of encumbrances thereon.[40]

An exclusive listing contract which provides for the sale at a specified amount net to the owner, and for the payment of a prescribed commission to the broker if it is sold for more or for less, regardless of who might make the sale, does not require the payment of a commission when the owner sells for the specified net price.[41] And if the broker assents to a rescission of a sales contract by the purchaser and vendor, he may not recover any commission.[42]

Eminent Domain.—Power of eminent domain can never be constitutionally exercised to acquire property for use by private individuals and private gain; hence the Redevelopment Law of 1946 is unconstitutional.[43]

The intended use of the property may be shown on the issue of value and consequential damage in a condemnation proceeding by city housing authority,[44] and it is recognized that the consequential damage may be substantial.[45]

Veterans.—A contract by which a veteran agrees to procure a loan and then convey the property to a third person is void as being contrary to the public policy expressed in the Servicemen's Readjustment Act.[46]

---

and Justice Duckworth, author of the opinion, has advised that it was intended that question numbered one be answered affirmatively and question numbered two be answered in the negative.

40. Gray v. Georgia Real Estate Commission, 209 Ga. 301, 71 S.E.2d 645 (1952).
41. Cole v. Pursley, 86 Ga. App. 452, 71 S.E.2d 575 (1952).
42. Vlas v. Walker, 86 Ga. App. 742, 72 S.E.2d 464 (1952).
43. Housing Authority of the City of Atlanta v. Johnson, 209 Ga. 560, 74 S.E.2d 891 (1953).
44. Housing Authority of the City of Dublin v. Cury Realty Company, 86 Ga. App. 527, 71 S.E.2d 898 (1952).
45. Housing Authority of the City of Quitman v. McDonald, 87 Ga. App. 407, 74 S.E.2d 113 (1953).
46. Glosser v. Powers, 209 Ga. 149, 71 S.E.2d 230 (1952).