South Carolina Law Review

Volume 9 | Issue 1 Article 19

Fall 1956

Property

David H. Means
University of South Carolina School of Law

PROPERTY

DAVID H. MEANS*

Adverse Possession

Seagle v. Montgomery[1] was an action to quiet title to a disputed area lying between the lands of plaintiffs and defendant. The decree for plaintiffs was affirmed on the ground that the evidence warranted the circuit judge's finding that plaintiffs had established title by adverse possession. The court said that the disputed area had "been protected by a substantial enclosure" within the meaning of § 10-2425 of the Code,[2] despite the fact that the fence may have been erected by the adjoining landowner instead of by plaintiffs' predecessor; that such fact would emphasize the recognition of plaintiffs' claim.

Boundary Disputes

In *McClintic v. Davis*[3] the court applied the doctrine of estoppel in pais in the settlement of a boundary dispute. Plaintiff had a survey made to establish the line between the lots of plaintiff and defendants' testatrix. Thereafter plaintiff constructed a building and concrete driveway on her lot in reliance upon the line as established. This was done with the knowledge of defendants' testatrix, who was present when the excavation for the drive was made, and made no protest when told that the line as established was correct. Subsequently defendants' testatrix contended that two feet of the drive was on her land.

The court held that defendants, as devisees of their mother, were estopped by her conduct from asserting any claim to the land on which the driveway was located, citing a number of South Carolina cases. The fact that the acquiescence in the boundary as established had not continued for the period of the Statute of Limitations was said to be immaterial, since an estoppel may arise in less than the

*Professor of Law, University of South Carolina.

1. 227 S.C. 436, 88 S.E. 2d 357 (1955).
2. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-2425.
"Adverse possession under claim of title not written.
For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed in the following cases only:
(1) When it has been protected by a substantial enclosure; and
(2) When it has been usually cultivated or improved."
3. 228 S.C. 378, 90 S.E. 2d 364 (1955).

period necessary to establish title by adverse possession, citing *Southern Ry. v. Day.*[4]

In *Lane v. Mims*[5] an action for damages and to enjoin defendants from trespassing on land allegedly owned by plaintiff, judgment on a verdict for defendants was affirmed. The court found that as to the issues of title and possession the evidence raised issues of fact which the trial Judge properly had submitted to the jury.

Estates Created

In *Shevlin v. Colony Lutheran Church*[6] the court again holds[7] that the grant to a life tenant of a power of disposition of the interest in remainder does not enlarge the life estate into a fee simple or absolute interest. Principal point in the case was the court's determination that the language of the will created a life estate with a remainder subject to a power to consume in the life tenant, rather than a grant of complete ownership to the first taker. The constructional problems are discussed in detail in the survey of wills.

Grainger v. Hamilton[8] reaffirms[9] South Carolina's adherence to the common law requirement of words of inheritance in a deed intended to convey a fee simple estate in land. In a suit for partition the crucial issue was the construction of a deed by a father to his daughter upon a recited consideration of "the love and good will I have for my daughter, Avy Jane Grainger . . . ."[10] There are no words of inheritance in the granting clause, and the habendum and subsequent clauses read: "To have and to hold unto her the said Ava Jane Grainger. And I do hereby bind myself, my heirs and assigns to warrant and defend the aforesaid Premises unto the said A. J. Grainger, her heirs and assigns against myself, my heirs and assigns and against every other person or persons claiming the same or any part thare with the following provisions. That I do hereby except my lifetime right on all of said Land,[11] and if she the said Ava Jane

4. 140 S.C. 388, 138 S.E. 870 (1926).
5. 228 S.C. 331, 90 S.E. 2d 207 (1955).
6. 227 S.C. 598, 88 S.E. 2d 674 (1955).
7. Earlier cases include Rogers v. Rogers, 221 S.C. 360, 70 S.E. 2d 637 (1952); Dye v. Beaver Creek Church, 48 S.C. 444, 26 S.E. 717 (1897). That this is the majority rule, see Notes, 36 A.L.R. 1177 (1925); 76 A.L.R. 1158 (1932). See also RESTATEMENT, PROPERTY § 111.
8. 228 S.C. 318, 90 S.E. 2d 209 (1955).
9. The court's opinion cites many earlier South Carolina cases.
10. The consideration for the conveyance is not stated in the opinion, but is found on page 17 of the transcript of record, where a copy of the deed is printed in full.
11. In view of the relationship between the grantor and grantee, the consideration expressed, and the fact that a life estate was reserved to the grantor, it is perhaps conceivable that the deed might have been construed as

Grainger shall die leaving no child or children, then the said Land at her decease shall return back to her brother and two sisters, (namely, W. C. Grainger, Ida Grainger, E. P. Grainger) and if she shall leave child or children, then at her decease the said Land shall return to them."

The circuit judge's interpretation of the deed is thus summarized in the court's opinion: "The master held that the words of inheritance appearing in the warranty are applicable to the habendum, and concluded that the deed conveyed a fee simple defeasible,[12] subject to life estate in the grantor who is now dead. The court reached the same result upon reasoning, without citation of supporting authority and we know of none, that the defeasance clause, which occurs after the warranty, shows the intent that the land should descend to surviving child or children, meaning heirs."

The court reversed the circuit decree on the ground that the omission of words of inheritance from both the granting clause and habendum of the deed limited the estates thereby created to estates for life only, since the omission of such words could not be remedied by their inclusion in the warranty. The opinion specifically mentions the fact that the action was not one for reformation of the deed.[13]

Dedication and Private Easements in Streets

Corbin v. Cherokee Realty Co. and the City of Florence[14] presents familiar propositions of law in an involved factual situation. Plaintiff purchased a lot in a subdivision without the City of Florence by a deed making reference to a recorded plat which showed the lot to be bounded on its side lot line by an unopened street 120 feet in width. With permission of the subdivision owner plaintiff planted pecan trees and a rose garden in the portion of the street area bordering his lot, which portion had been designed for a sidewalk and shrubbery area.

---

a covenant to stand seised to uses, in which event — under the South Carolina view — the omission of words of inheritance would be immaterial. Bank of Prosperity v. Dominick, 116 S.C. 228, 107 S.E. 914 (1921); Gaines v. Sullivan, 117 S.C. 475, 109 S.E. 276 (1921); First Carolinas Joint Stock Land Bank v. Ford, 177 S.C. 40, 180 S.E. 562 (1935).

12. Assuming, as the master did, that words of inheritance are unnecessary, perhaps the limitation should be construed to create alternative contingent remainders in fee simple following the grant of a life estate to Avy Jane Grainger, instead of, as the master ruled, a fee simple estate in her subject to an executory limitation upon her death without surviving children. A consideration of this problem was unnecessary for the decision of the appeal.

13. To the effect that a voluntary deed may be reformed to embody omitted words of inheritance as against the heirs of the deceased grantor, see Lawrence v. Clark, 115 S.C. 67, 104 S.E. 330 (1920); Groce v. Benson, 168 S.C. 145, 167 S.E. 15 (1933).

14. 229 S.C. 16, 91 S.E. 2d 542 (1956).

More than 20 years later the City of Florence, which had annexed the subdivision, brought condemnation proceedings to which plaintiff was not made a party. These proceedings resulted in a judgment establishing title of the city to the area of the street 50 feet in width which immediately borders plaintiff's lot. Subsequently the court ordered the City to open this 50 foot area as a street, whereupon plaintiff instituted his action against the present subdivision owner and the City to enjoin such opening of the street. Plaintiff's contention was that the street could be opened only in accordance with the original plan for the street. He further contended that he had acquired title by adverse possession to that portion of the original sidewalk area upon which he had planted pecan trees and a rose garden.

On appeal the trial Judge's order refusing an injunction and dismissing the action was affirmed. The court conceded that the sale of lots to the plaintiff with reference to a plat gave the plaintiff a right in the unopened street as against the subdivider, who thereafter could not change the street's location and width without plaintiff's consent. However, as against the City, plaintiff's contention that property dedicated for one purpose cannot be used for another, and, therefore, that the area designated for a sidewalk could only be so used, was found to be without merit. This was because the contemplated use for street rather than sidewalk and beautification area was not based on acceptance of the street as dedicated, but stemmed from the condemnation proceeding.

Regarding plaintiff's claim of title by adverse possession, the court said that title could not thus be acquired as against the County or City.[15] Finally, the fact that plaintiff had not been a party to the condemnation proceeding was immaterial. The court said that the opening of the street would not result in a physical invasion of plaintiff's lot, but only in alleged consequential damage resulting from the failure to construct the street in the manner originally planned. Therefore, in accord with *Moss v. S. C. State Highway Dept.*,[16] plaintiff's remedy, if any, would be only for compensation for the "taking" of his property under Article 1, Section 17 of the State Constitution.

15. The Court's rationale seems necessarily to presuppose an acceptance of the offer to dedicate, either by members of the public or by the public authorities prior to plaintiff's acquisition of title by adverse possession, as otherwise the public would have acquired no rghts. *Cf.* Outlaw v. Moise, 222 S.C. 24, 71 S.E. 2d 509 (1952). An additional reason for denying plaintiff's claim of adverse possession, assuming the city theretofore had not accepted the dedication, would be that as against the subdivider plaintiff's possession was permissive and not adverse. Among other cases see Williamson v. Abbott, 107 S.C. 397, 93 S.E. 15 (1917).

16. 223 S.C. 282, 75 S.E. 2d 462 (1953).

Dower

In *United States v. State of South Carolina*[17] the Court of Common Pleas had ordered a sale of the real estate of an insolvent debtor, and fixed the value of the inchoate right of dower of the debtor's wife at one-sixth of the amount of the sales price. The appeal of the United States primarily raised issues as to the relative rank of a lien for federal income tax with judgment liens and liens for state, county, and municipal taxes. However, on appeal the United States for the first time argued that the present value of the wife's dower interest during the life of her husband was not one-sixth the amount of the sales price, but a lesser sum to be computed according to the formula laid down in *Ladshaw v. Drake*.[18]

Affirming the judgment, the court said, as to the dower contention, that the objection not having been made in the lower court, it could not be made on appeal.

Restrictive Covenants

Edwards v. Surratt[19] poses the problem of the right of a lot owner to sue on a restrictive covenant imposed by his predecessor in title upon a prior grantee of another lot. The facts were that the owner of a tract of some 700 acres conveyed 3.47 acres thereof by a deed containing the following restriction: "Said property to be used for residential purposes for white people only." The grantee subdivided the 3.47 acres into five lots, which were sold to various parties. The owners of these lots subsequently executed an instrument mutually releasing the restrictions on their respective lots. Thereafter defendant, owner of one of these lots, undertook to erect a filling station thereon, and plaintiffs sued him to enjoin any use not in conformity with the restriction. Plaintiffs' lots were not within the 3.47 acre tract, but were parts of the larger tract of 700 acres. One of the plaintiffs was an heir[20] of the deceased grantor, while the others were

17. 227 S.C. 187, 87 S.E. 2d 577 (1955).

18. 183 S.C. 536, 543, 191 S.E. 713 (1937), wherein the rule is given as follows:

> "The present value of the wife's contingent right of dower during the life of the husband can be computed. 2 *Scribner, Dower,* 8. The correct rule of computation is to ascertain the present value of an annuity for her life, equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct, from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband. The difference between these two sums will be the present value of her contingent right of dower."

19. 228 S.C. 512, 90 S.E. 2d 906 (1956).

20. The opinion mentions but does not expressly dispose of, the contention of this heir that he was entitled to enforce the restriction *as heir,* as well as because of his ownership of property intended to be benefitted. As concerns

grantees from heirs of the deceased grantor. Prior to the action one of the plaintiffs, as well as other heirs of the deceased grantor, had permitted the use for business purposes of other portions of the 700 acre tract inherited by them.

On appeal the Supreme Court affirmed the trial Judge's order denying plaintiffs relief. Plaintiffs had no right to sue on the restriction since there was no showing that it was intended to benefit the lands now owned by them. The court said that the deed of the 3.47 acres expressed no such intention, nor could such intention be implied from the existence of a general scheme of development, as the court found the evidence not to establish a single development of the entire area according to a general scheme or plan. The opinion cites and distinguishes several earlier South Carolina cases involving general schemes of development.

In *Maxwell v. Smith*[21] the defendant, owner of a residential subdivision, conveyed to the county rights of way for the roads as shown on a plat of the subdivision. Thereafter he imposed restrictive covenants "upon said area and the lots composing the same as now shown on said plat and such as may hereafter be added thereto." Later it was discovered that a storehouse built by defendant prior to the imposition of the restrictions, by mistake had been located in a road right of way as designated on the plat. Accordingly, a new right of way was conveyed to the county, in exchange for which the county reconveyed to defendant the area on which the storehouse was situate. Defendant commenced construction to convert the storehouse into a residence, whereupon plaintiffs, purchasers of lots within the subdivision, sued to compel its removal from its present location on the grounds that as located the structure violated building line restrictions and lot area requirements imposed by the restrictive covenants. Plaintiffs further sought to compel the removal of a lake and minnow pools the defendant had constructed on lots within the subdivision for the commercial breeding of minnows.

On appeal, the lower court decree granting the relief sought was affirmed, with slight modification as to the removal of certain debris allegedly incident to the defendant's constructions. Despite defendant's contention that the portion of the original right of way on which the storehouse stood was without the restricted area, the court found the building as located to be within the restricted area and in violation of the restrictions. Furthermore, the lake and minnow

the rights of the heirs as such, presumably the court found the restriction to be one imposed for the grantor's personal benefit, which restriction therefore expired with his death. See Skinner v. Shepard, 130 Mass. 180 (1881).

21. 228 S.C. 182, 89 S.E. 2d 280 (1955).

pools being on vacant lots and not incidental to a residential use of the property, were in violation of the restriction requiring use "for residential purposes only," even assuming that defendant had abandoned his intention to use them for commercial purposes. The plaintiffs were not precluded by laches from invoking the covenants. The County Court of Richland County, in which the action was brought, had jurisdiction thereof.

Dunham v. Davis[22] was an action to recover possession of land wherein defendant set up title under a tax deed and by adverse possession, and further sought foreclosure of a mortgage on the land in the event plaintiffs were found to have any interest therein. The facts were that one W. A. Dunham, owner of the land, had died intestate in 1913, survived by his widow and six children. In 1931 the widow and one of the children died, both intestate, the latter leaving as her heirs 7 children, who, together with the 5 surviving children of W. A. Dunham, were plaintiffs in the action. On December 31, 1935, the 5 children and one of the grandchildren mortgaged the land to defendant's father, who on the same day assigned the mortgage to defendant. Six days after the execution and assignment of the mortgage defendant bid in the land at a tax sale pursuant to a levy made on December 3, 1935, under tax execution issued against "Estate W. A. Dunham." Some of the plaintiffs continued to occupy and farm the land until 1951, though defendant contended their occupancy was that of renters from him.

On the trial of the case the circuit judge ruled that defendant's claim of title under the tax deed was invalid. On the issue of adverse possession the jury found for defendant, but thereafter the trial Judge granted plaintiffs' motion for judgment notwithstanding the verdict.

On appeal judgment was affirmed and the cause remanded. As regards the tax sale, the court said that since there had been no administration on the estate of W. A. Dunham, the sale for taxes in the name of his estate was void, citing a number of South Carolina cases. The two year statute of limitations[23] in 1936 did not operate in favor of such a purchaser, citing *Smith v. Cox*.[24]

Regarding defendant's contention that the sale was validated by the Act of 1947,[25] the court assumed without deciding that section

22. 229 S.C. 29, 91 S.E. 2d 716 (1956).
23. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 65-2779.
24. 83 S.C. 1, 65 S.E. 222 (1909).
25. 45 STAT. 530 (1947)
"Section 1: That, for the purpose of enforcing the payment and collection of delinquent taxes, the State, or any sub-division or municipality

one of the Act is applicable to a case where a tax levy and sale are made in the name of the estate of a person although no administration was had. Likewise it is assumed that the application to the tax sale of the retroactive provisions of section three of the Act would not be affected by the omission of section three from the 1952 Code.[26] Nevertheless, the court said that the application of section three to plaintiffs' claim would be unconstitutional because it would deprive them of property without due process of law. Furthermore, the court found that section two of the Act, which expressly makes the two year statute of limitations applicable to tax sales referred to in section one, was not intended to be retroactive, but to apply only to tax sales made after the effective date of the Act, May 12, 1947.

The court further pointed out that apart from the foregoing considerations, the tax sale could not avail defendant as against plaintiffs, since such a purchase by the mortgagee is deemed to have been for the protection of his lien and not to have defeated the mortgagor's title, citing *DeLaine v. DeLaine*.[27]

As to defendant's claim of title by adverse possession, the court said that "[i]n order to perfect in a mortgagee title by adverse possession as against the mortgagor, the adverse acts relied upon by the former must be such as to give notice that he is claiming not as mortgagee, but as owner," citing South Carolina cases. While the evidence upon the issue of adverse possession was found to be sufficient for the jury as to certain plaintiffs, it was wholly lacking as to other plaintiffs.

Hemingway v. Mention[28] was a suit in equity to invalidate a tax deed and for an accounting and partition. Plaintiffs, three children of A. J. Hemingway, claimed a 3/4 interest in a 50 acre tract, alleging that they and their deceased sister, Adelaide, were the sole heirs

---

thereof, is authorized and empowered to levy upon and sell any property real or personal in the name of the person, firm or corporation in whose name the property was returned for taxation whether or not he, she or it be deceased or in existence at the time of the levy and/or sale without naming or referring to the heirs or estate of such owner.

"Section 2: That the Statute of Limitations applicable to tax execution sales, generally, shall apply to sales made as herein above provided for.

"Section 3: That this Act shall apply to sales heretofore made, as aforesaid, and such sales are hereby confirmed; Provided, however, this Act shall not be construed so as to affect suits or actions pending on claims heretofore actually made against purchasers or their heirs or grantees."

26. Sections one and two of the Act of 1947 appear in CODE OF LAWS OF SOUTH CAROLINA, 1952, as sections 65-2769 and 65-2769.1 respectively, but section three is omitted from the 1952 CODE.

27. 211 S.C. 223, 44 S.E. 2d 442 (1947).

28. 228 S.C. 211, 89 S.E. 2d 369 (1955).

of their father, who died intestate in 1916, seised of a larger tract embracing the land in suit. In 1932, pursuant to a tax sale in the name of A. J. Hemingway, the property was sold to the Forfeited Land Commission. In 1935 a purchaser from the Forfeited Land Commission had the conveyance made to Adelaide as a gift to her. In 1941 Adelaide sold and conveyed the land to the defendant, who thereafter made valuable improvements thereon. The family of A. J. Hemingway had not occupied the land since 1924, and the present action was not commenced until 1951.

Plaintiffs contended that the tax sale was void because made in the name of the deceased former owner. Also, that Adelaide could gain no advantage over her cotenants, the plaintiffs, by reason of her acquisition of the land as a result of the tax sale.

On appeal the circuit decree dismissing the appeal was affirmed. In a per curiam opinion the court said that plaintiffs claim, however meritorious if timely asserted, was barred by laches, citing earlier South Carolina cases. The court referred to the valuable improvements made by defendant and pointed out that plaintiffs did not bring this action until almost 20 years after the tax sale.

Personal Property

In *Chilean Nitrate Sales Corp. v. Southern Railway*[29] the lower court had held the defendant railway liable for the destruction by fire of plaintiff's goods on the theory that at the time of the loss delivery of the goods to the railway had been accomplished. On appeal this judgment of the lower court was reversed, the Supreme Court finding the evidence to establish that at the time of the fire the goods were still in control of the shipper and no delivery had been made. This was true despite the fact that bills of lading had been issued, since the evidence was found to rebut the presumption of delivery arising from the issuance of bills of lading.

In *Royal Liverpool Insurance Group v. McCarthy*[30] an automobile dealer who in good faith had purchased and resold a stolen automobile was held liable to the true owner in an action for conversion. An award to the plaintiff of the sum for which the defendant had resold the automobile was approved, the court quoting the following from an earlier South Carolina case[31] as to the proper measure of damages:

29. 227 S.C. 423, 88 S.E. 2d 242 (1955).
30. 229 S.C. 72, 91 S.E. 2d 881 (1956).
31. Sizer & Company v. Dopson, 89 S.C. 535, 538, 72 S.E. 464 (1911).

> In actions for conversion or for the taking and detention of personal property, the general rule is that the measure of damages is the value of the property with interest thereon, and the jury may give the highest value up to the time of the trial.

In *Stephens v. Hendricks*[32] the court held an automobile which had been placed for sale with an automobile dealer not to be subject to seizure and sale for the dealer's delinquent sales taxes which had accrued prior to delivery of the automobile. The fact that there was no recorded bailment agreement was held immaterial since the State was an antecedent rather than a subsequent creditor, and therefore not entitled to the protection of the bailment statute.[33]

Cases Omitted

To avoid needless duplication this survey of property does not discuss certain cases which have been treated in other sections of the annual survey. Thus, treated in the survey of Wills is *Davis v. Sellers*,[34] which holds the general recording statutes[35] not to require the recordation of a will in every county in which the decedent owned real estate. Treated in the survey of Public Corporations is *Hall v. City of Greenville*,[36] involving municipal liability for damage to real property resulting from the municipality's failure to provide adequate drainage for surface water from municipal streets. Also reviewed in the Public Corporations survey is *James v. City of Greenville*,[37] wherein an attempted application of Greenville's zoning ordinance to a previously existing nonconforming use of land was held unconstitutional.

Lee v. Southern Railway Company[38] a suit by a landowner against a railroad arising out of the defendant's alleged concentration and diversion of surface water, is decided upon principles of pleading rather than upon the substantive law of property. See the survey of Pleading for a discussion of this case.

32. 228 S.C. 458, 90 S.E. 2d 632 (1955).
33. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-308.
34. 229 S.C. 81, 91 S.E. 2d 885 (1956).
35. CODE OF LAWS OF SOUTH CAROLINA, 1952 Tit. 60, §§ 101 through 109, and § 57. A statute enacted in 1955 (49 STAT. 191, CODE OF LAWS OF SOUTH CAROLINA, 1952, as amended § 19-264.1) provides for the filing of a certified copy of the will in every county in which the deceased owned real estate. The court pointed out that this statute was inapplicable to the instant case, and further, "intimate[d] nothing here relative to its effect or interpretation."
36. 227 S.C. 375, 88 S.E. 2d 246 (1955).
37. 227 S.C. 565, 88 S.E. 2d 661 (1955).
38. 228 S.C. 244, 89 S.E. 2d 431 (1955).

Legislation

Sole property legislation during the survey period was an act approved 16 Feb. 1956, which corrects erroneous code references in Sections 10-2454, 10-2455 and 10-2457, CODE OF LAWS OF SOUTH CAROLINA, 1952. These amended sections provide a procedure whereby holders of estates in reversion, remainder or expectancy may establish whether the holder of the prior estate be alive or dead.