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Property

David H. Means
University of South Carolina School of Law

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PROPERTY

DAVID H. MEANS*

Abandonment of Highways

In an action brought by abutting landowners to enjoin the closing of an old road after the construction of a new road by the State Highway Department, the circuit judge thus stated the applicable rule:[1]

> The principle of the common law that where is once a highway there is always a highway is subject, of course, to certain limitations and exceptions. At the same time this general principle obtains and will govern any case in which the Highway Department or any other authority, or an individual, seeks to abandon an existing highway. It is axiomatic that a public highway is not abandoned simply because a new highway is built. [Citation omitted.]
>
> If all of the property owners abutting this highway agreed to an abandonment of the same, then the public might have no rights in the highway, but as long as the various adjoining property owners do not agree then the existing road or highway must remain open and must be maintained by the proper authority for use of such owners.
>
> . . . . The decisions hold that not only is the street or road not vacated but that it is still a part of the public roadway system . . . and therefore it cannot be closed and it is incumbent upon the proper authorities . . . to maintain the roadway.

On appeal,[2] the circuit order granting the relief sought was affirmed and adopted as the judgment of the Court.

Betterments

A prior appeal in *Dunham v. Davis*,[3] an action to recover possession of realty, decided the issue of title v. defendant, a mortgagee in possession claiming title by adverse possession as well as under a tax deed. The case was remanded for an accounting to include the foreclosure of defendant's mort-

*Professor of Law, University of South Carolina.

1. Wessinger v. Goza, 231 S. C. 607, 611, 99 S. E. 2d 395 (1957).
2. Wessinger v. Goza, *supra* note 1.
3. 229 S. C. 29, 91 S. E. 2d 716 (1956); on present appeal, 232 S. C. 175, 101 S. E. 2d 278 (1957).

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gage and a determination of any credit due defendant under the betterment statutes[4] for improvements on the realty. A number of items were included in the subsequent circuit court order of account, which order, on appeal by defendant, was affirmed and adopted as the opinion of the Court.

Under the betterment statutes defendant could recover for erecting buildings which increased the value of the land, as well as for removing another building of no value to the farm, since such removal increased the area available for farming. The amount which defendant could recover for clearing the land was the enhancement in value rather than the expense of the clearing. Since the evidence was insufficient to establish the value of such enhancement the circuit judge properly referred the case back to the referee to receive further evidence. The defendant was entitled to compensation for the improvement of the land resulting from fertilization beyond that customary for the purpose of growing crops. However, defendant could not recover the expense of his preparation of the land for farming the year he was dispossessed, since such preparation came within the ordinary course of tillage and was not an improvement. Nor could he recover the enhanced value of the timber on the land, he having "done nothing to the timber lands in the nature of fertilization, setting out young trees, thinning out undesirable growth of scrub timber . . . , construction of fences, or anything which can be considered an addition to the timber lands."

Section 57-407 of the betterments chapter[5] provides that in an action for recovery of land the defendant may recover betterments against the plaintiff only "if it be shown that the defendant believed he was taking a good title in fee simple thereto at the time of the alleged taking thereof." This good faith requirement was applied in *Reaves v. Stone*[6] to deny betterments to defendants claiming under a tax title of their ancestor, which title concededly was defective because the sale had been made in the name of the deceased owner rather than in the names of his heirs at law. The Court observed that not only did defendants' answer omit the necessary good faith allegation, but also evidence on the point was lacking. Moreover, there was no appeal from the finding by the master and

4. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 57-401 thru 57-410.
5. CODE OF LAWS OF SOUTH CAROLINA, 1952 tit. 57 c. 9.
6. 231 S. C. 628, 99 S. E. 2d 729 (1957).

the circuit judge that defendants' ancestor had acquired his claim with knowledge that "his title was at best a questionable one...."

On petition for rehearing defendants contended that their claim for improvements was governed by the statute[7] relating to the recovery of improvements made by a dispossessed purchaser at a tax sale. After noting that no decisions construing or applying the statute had been found, the Court excluded its consideration on the ground that the theory upon which a case was tried cannot be changed for purpose of appeal. Furthermore, denial of the petition for rehearing would result in no prejudice to defendants. This was because the circuit court having offset defendants' claim for betterments against plaintiffs' claim for rent for defendants' occupancy, and plaintiffs not having appealed from the decree, defendants had fared as well as if the tax sale statute had been applied in accordance with their construction thereof.

Boundary Disputes

Of the three cases arising out of boundary disputes decided during the survey period, two[8] present procedural rather than property questions. The third[9] was an action for determination of boundaries between the several lands of plaintiffs and land of defendant and for a declaration of the rights of the parties in said lands. An injunction against defendant's trespass on plaintiffs' lands and his removal and disposition of timber wrongfully cut thereon was also sought, as well as an accounting for timber already disposed of. The answer of defendant alleged title to the disputed area in himself. In an opinion containing a detailed review of the evidence the Supreme Court affirmed the decree of the circuit judge, who had found the correct boundary to be as contended for by defendant.

No survey by a surveyor appointed by the circuit judge pursuant to statute[10] had been made. However, the Court pointed out that the statute is not mandatory. Moreover, not only were plaintiffs found to have waived their rights to such a survey, but also they were not prejudiced by its omission. Essentially the action was trespass to try title, despite the fact that it was

7. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 65-2782.
8. Metze v. Meetze, 231 S. C. 154, 97 S. E. 2d 514 (1957); Nash v. Gardner, 232 S. C. 215, 101 S. E. 2d 283 (1957).
9. Rush v. Thigpen, 231 S. C. 230, 98 S. E. 2d 245 (1957).
10. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-452.

cast under the declaratory judgment statute.[11] Therefore, the trial judge correctly ruled that plaintiffs must recover upon strength of their own title, not upon the weakness of that of defendant.

Prior to defendant's acquisition of title his grantor had conveyed by a recorded deed the timber on the land to one whose rights had expired long before the conveyance to defendant. Plaintiffs contended that defendant was bound by a plat his grantor had made in connection with the above timber deed. However, the Court found there was no evidence of defendant's acquiescence therein; he testified he had no knowledge thereof at the time of his purchase, and the plat was not a link in his chain of title.

Fixtures

In *Pope v. McMillan*,[12] an action for a declaratory judgment, the question was whether or not the sale of a petroleum business and good will and "the tangible assets consisting of all equipment such as trucks, repair parts, tanks, pumps . . . except, the tanks underground at the filling station, or thereabout . . ." included certain underground tanks which defendant vendors contended were excluded from the sale. In affirming a judgment for the vendee the Court found "no merit in [vendors'] suggestion that the tanks in controversy must be deemed to have been excluded from the sale because they were 'common-law fixtures,' as distinguished from 'trade fixtures,' therefore part of the real estate, and therefore not included because no real estate was being sold. We know of no legal barrier to the voluntary sale of a common-law fixture, separate from the land upon which it is located, by the owner of both."

Merger of Terms of Contract in Deed

The well recognized rule is that the terms of a deed which has been accepted in performance of a contract for the sale of land supersede or merge any inconsistent terms of the contract.[13] In *Charleston & Western Carolina Rwy. Co. v. Joyce*[14] the rule is applied to determine the correct text of a disputed clause in an option for the purchase of land. Plaintiff railway was engaged in a realignment of its tracks, and de-

11. CODE OF LAWS OF SOUTH CAROLINA, 1952 tit. 10 c. 24.
12. 232 S. C. 100, 101 S. E. 2d 55 (1957).
13. Annot., 38 A. L. R. 2d 1310 (1954).
14. 231 S. C. 493, 99 S. E. 2d 187 (1957).

fendant had given plaintiff an option to purchase a right of way for the new track. Consideration for the conveyance to be made was the payment of a cash sum and the relinquishment to defendant of plaintiff's right in the portion of the old right of way to be abandoned, subject to plaintiff's right to remove "all tracks and appurtenances thereto . . . except . . . old cross ties which cannot be used in new track." The option had been executed in duplicate, and the quoted language appeared in plaintiff's copy and in the subsequent deed, but in defendant's copy the word "the" appeared before "new track".

In a declaratory judgment action to determine the meaning of the clause the Court invoked the merger rule to establish its text as embodied in the deed and in plaintiff's copy of the option. The Court reasoned that the deed merged the prior contract and rendered immaterial the text in the option copy retained by defendant. The case also involves procedural matters, as well as an application of the parol evidence rule.

Rescission of Deeds

In *Avant v. Johnson*,[15] an action by the devisee of a deceased grantor to set aside a deed of his testatrix on the grounds of mental incapacity, fraud, undue influence and inadequacy of consideration, the Court agreed with the circuit judge that the evidence failed to sustain plaintiff's contentions. The circuit court opinion, which contains an extensive review of the evidence, is adopted as the opinion of the Court.

Restrictive Covenants

Where successive conveyances of lots in a subdivision are made subject to identical residential use restrictions "for a period of 21 years from the date of this conveyance," do the restrictions on all lots expire 21 years from the date of the first conveyance, or is each lot bound for 21 years after the date of its conveyance? In *Stanton v. Gulf Oil Corp.*,[16] an action for a declaratory judgment, the circuit judge held that the restrictions on all lots expired 21 years after the date of the first conveyance. On appeal the circuit court judgment was affirmed. The Court reasoned that the restrictions no longer being enforceable against the purchaser of the first lot, the requirement of mutuality of burden no longer existed, and the convenants therefore were not enforceable by one lot

15. 231 S. C. 119, 97 S. E. 2d 396 (1957).
16. 232 S. C. 148, 101 S. E. 2d 250 (1957).

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owner against another. It is noteworthy that the Supreme Court opinion implies that even though lot owners no longer have rights *inter se*, the covenant may remain enforceable by the original grantor as to each lot for 21 years after the date of its conveyance. Since the original grantor did not appeal from the judgment of the circuit court, however, decision of the point was unnecessary.

In *Holling v. Margiotta*[17] covenants imposed in 1939 restricted until 1963 the use of lots in a subdivision for residential purposes only. Despite the restrictions, in 1956 the defendants, owners of a lot in the subdivision, over protest by owners of other lots, altered into a commercial building an existing residential apartment building on their lot. As altered, which was at the expense of about $3000, the building was little changed in outward appearance except for signs and advertisements placed on it. In a suit by the protesting owners the circuit court enjoined defendants from further commercial use of their lot and ordered them to restore the building's appearance to that of a residence. On appeal by defendants the decree was modified in part and affirmed as modified. The Court agreed with the trial judge that the defenses of laches, estoppel and waiver had not been established. Nor had the development of businesses near the subdivision so changed its character as to make inequitable enforcement of the covenants. Likewise, inconsequential use violations within the subdivision had not substantially changed its residential character. Furthermore, the fact that the use restrictions would expire within six years did not make inequitable their enforcement for the remaining period of duration. However, in view of the imminence of the end of the restrictions "it would be inequitable to compel the costly restoration of it to its former appearance and location, in view of the absence of commensurate benefits to other lot-owners during the relatively short remaining life of the restrictions." Accordingly, defendants were required only to cease their commercial use of the building and to remove therefrom the signs and advertisements.

Specific Performance of Contract for Sale of Land

The decision in *Scurry v. Edwards*,[18] an action to quiet title to land, is predicated upon a finding of sufficient part performance of an oral contract for the sale of land to remove

17. 231 S. C. 676, 100 S. E. 2d 397 (1957).
18. 232 S. C. 53, 100 S. E. 2d 812 (1957).

the contract from the operation of the Statute of Frauds. Discussion of the case is omitted in the Property section, since for survey purposes it more appropriately is reviewed in the Contracts section.

PERSONAL PROPERTY

Gifts

Watkins v. Hodge[19] is concerned with the question of whether or not a gift was made by plaintiff to defendant of some fifty lottery tickets, one of which proved to be the winning number at a drawing for an automobile. Plaintiff contended that defendant's possession of the tickets at the drawing was as plaintiff's representative, while defendant claimed that plaintiff had made a gift of the tickets to her. Plaintiff did not attend the drawing, but defendant, who was present and held the winning number, was awarded possession of the automobile. Thereafter plaintiff brought claim and delivery upon defendant's refusal to deliver the automobile to plaintiff. The trial judge submitted the issue of gift to the jury, who found for defendant, but thereafter judgment notwithstanding the verdict was entered for plaintiff on the ground that the evidence did not establish a gift of the tickets.

On appeal the action of the trial judge was affirmed. The evidence was found to establish an agreement that plaintiff might reclaim the tickets if she should be able to attend the drawing. Such agreement, the Court said, negatived the existence in the instant case of the absolute and unqualified delivery needed to divest a donor of his control and dominion over the chattel and transfer ownership of the same to a donee. For procedural reasons the Court refused to consider defendant's contention that since the drawing constituted an illegal lottery the court should not entertain the action.

Bailments

In *Howle v. McDaniel*,[20] apparently a case of novel impression in South Carolina, it is held that the contributory negligence of a bailee will not be imputed to his bailor in the bailor's action against a third party for damages to the bailed chattel (in the particular case, an automobile). The decision is in line with the weight of modern authority.[21]

19. 232 S. C. 245, 101 S. E. 2d 657 (1958).
20. 232 S. C. 125, 101 S. E. 2d 255 (1957).
21. See the many authorities cited in the opinion of the Court.

Recording of Chattel Mortgages

South Carolina National Bank v. Guest[22] is the most noteworthy property decision within the survey period, not because it represents a departure,[23] but because the result therein has resulted in a change of far reaching importance in the recording act applicable both to land and personal property. The facts are that one Guest procured a loan from plaintiff and gave a chattel mortgage upon an automobile to secure the same. Later the same day he borrowed money from a second bank upon the same automobile, representing that it was unencumbered. Although the mortgage to plaintiff bank was first in point of time and first of record, at the time of execution of the mortgage to the second bank plaintiff's mortgage had not been recorded, and the second bank acted in good faith and without notice of the prior mortgage. In an action to determine priority between the mortgage claimants it was held that the second bank prevailed.

The Court points out that although different requirements are found in the recording acts of some of the states,[24] under the then existing South Carolina statute[25] the sole test of priority to be met by a subsequent purchaser or mortgagee for value is his want of notice of the prior interest at the time of his purchase or mortgage. Therefore, in the instant case the second bank not having notice of the prior interest at the time it took its mortgage, the fact that thereafter it failed to record first was immaterial, since its priority of interest already had been established.

22. 232 S. C. 367, 102 S. E. 2d 215 (1958).

23. Prior cases to the same effect are Williams v. Beard, 1 S. C. 309 (1870), and Turpin v. Sudduth, 53 S. C. 295, 31 S. E. 245 (1898).

24. The recording acts of some states make time of recordation the sole test of priority between successive grantees of the same land from a common grantor. Under the recording acts of other states the priority of a subsequent purchaser depends upon his showing not only a lack of notice at the time of his purchase, but also that he has won the race to record. The acts of a third group of states make want of notice of the prior conveyance the sole test of priority between successive grantees. At the time of the decision of *South Carolina National Bank v. Guest* the South Carolina act was of the third type. However, since the amendment of 1958 (note 26 *infra*), the South Carolina act is of the second type. Recording acts of the first type commonly are referred to as "race" acts, of the second type as "notice-race" acts, and of the third type as "notice" acts. Although a few states have recording acts of the "race" type, the majority of the states are fairly evenly divided between "notice-race" acts and "notice" acts. For a detailed discussion of the types of recording acts and a classification of the acts of the various states, see 4 AMERICAN LAW OF PROPERTY § 17.5 (Casner ed. 1952). See also Annot., 32 A. L. R. 344, 351 (1924).

25. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101.

Legislation

As a consequence of the decision in the *Guest* case the following amendment[26] to the general recording statute[26a] thereafter was enacted:

> *Provided,* however, that in case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate or personal property or both, for valuable consideration without notice, the instrument evidencing such subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority shall be determined by the time of filing for record.

It is obvious that the effect of the amendment is to alter the rule of the *Guest* case so as to impose upon the subsequent purchaser or mortgagee of real or personal property the added requirement that he first record in order that he be protected under the recording act against prior instruments unrecorded at the time of his purchase or acquisition of his lien. However, it seems improbable that the amendment will be held to affect instruments executed prior to the date of its approval.[27] Moreover, what effect, if any, it has in bankruptcy and receivership proceedings, as well as its possible application to other issues arising under the recording statute, are questions yet to be determined.[28]

26. 50 STAT. 1958, approved April 28, 1958, amending CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101.

26a. The amending act refers only to the general recording statute (§60-101), and does not purport expressly to affect the bailment statute (§57-308). Thus it is probable that the rule of the *Guest* case continues applicable in situations where a subsequent purchaser or mortgagee of personal property is claiming the protection of the bailment statute. In Armour & Co. v. Ross, 78 S. C. 294, 58 S. E. 941 (1907), Justice Woods dissenting, it was held that the amendment extending the protection of the general recording statute to simple contract creditors [22 Stat. 746 (1898)] did not by inference likewise amend the bailment statute. Subsequent to the *Armour* case the bailment statute expressly was amended [26 Stat. 747 (1910)].

27. Unless provision is made for its retrospective operation, a recording statute usually is construed not to apply to instruments executed prior to its enactment. See Annot., 121 A. L. R. 909 (1939).

28. See Means, *The Recording of Land Titles in South Carolina (Herein of Bona Fide Purchase of Land): A Title Examiner's Guide,* 10 S. C. L. Q. 376 nn. 118c and 118d (1958).