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Real and Personal Property

David H. Means
University of South Carolina

REAL AND PERSONAL PROPERTY

DAVID H. MEANS*

Adverse Possession

In *Gregg v. Moore*[1] the court rejected a claim of adverse possession made by the purchaser at a void tax sale against the holders of the record title. Apparently in the belief that an aunt of a deceased owner through whom the plaintiffs' title was derived had a life estate in the lot and dwelling in question, plaintiffs' predecessors in title had acquiesced in the aunt's occupancy of the premises and appropriation of the rents therefrom for a period from 1921 until her death in 1949. In 1932 the property was conveyed to defendant pursuant to a tax sale conceded to be void. After the death of the aunt plaintiffs acquired title to the property and brought this action to recover possession from the defendant, who set up the defense of adverse possession. The decision of the Referee and the circuit judge that defendant had acquired title by adverse possession was reversed by the Supreme Court, and the plaintiff held entitled to a return of the property and an accounting for the rents since 1949.

The court found that after the tax sale to the defendant the aunt continued in possession of the property until her death in 1949, less than 10 years prior to the commencement of plaintiffs' action, and until that time there was no change in possession which would bring home to the owners of the property notice of the fact that defendant was asserting title thereto. Defendant never notified the owners of his claim of title, said the court, and under the facts in the case (a family relationship and an arrangement prior to the tax sale whereby defendant paid the taxes on the property), the mere fact that after the tax sale the defendant returned the property in his name and paid the taxes thereon was insufficient to charge the owners with notice of his adverse claim.

> The burden was on [defendant] to show that the entry was a hostile one, and this he has not done. If his entry was not hostile, adverse possession could not be said to have begun until notice thereof was brought home to the true owner, which was in 1949 after the death of [the aunt].

*Professor of Law, University of South Carolina.

1. 85 S.E. 2d 279 (S.C. 1955).

Construction of Limitations

In *Furman University v. Glover*[2] the court considered the effect of the following clause in two deeds of land to the State Convention of the Baptist Denomination in South Carolina (a corporation):

> . . . in trust for and to the use of The Furman University for educational purposes connected with the said The Furman University, and for no other purpose whatsoever. That is to say, that the State Convention of the Baptist Denomination in South Carolina shall henceforth and forever permit and suffer the said The Furman University to hold, possess and enjoy the said tract or parcel of land as a site and location for all colleges, academies, schoolhouses, professors' houses or other buildings or matters of any kind whatsoever necessary for or connected with the educational purposes of the said The Furman University.[3]

The conveyances had been made in 1851 and 1852 for the then full value of the lands. The University asked for a declaratory judgment that it is vested with an indefeasible fee simple title, with full power to sell, lease or otherwise dispose of the lands. In accordance with an earlier construction of one of the deeds,[4] the court held the language in question "was merely declaratory of the purpose, that the conveyance did not contain any condition subsequent, or reserve any right or interest whatsoever [in the grantor], that the grantor intended to divest himself fully of the title, that the Baptist Convention held a dry or naked trust, and that the statute of uses operated to convey the fee to Furman University".

A third conveyance made by the same grantor to the Trustees of the Greenville Academy was likewise declared to reserve no interest in the grantor. Other than deciding that the original grantor had no interest therein, the court refused to determine whether or not a subsequent conveyance by the Academy Trustees to Furman University was made subject to a trust. This was because certain interested persons were not parties to the present action.

Nash v. Gardner[5] presents a number of interesting construction of limitations problems. However, since the case primarily is concerned with the proper disposition of a lapsed devise, it is omitted from this property review, and is treated in all aspects by Professor Karesh in his review of Wills.

2. 226 S.C. 1, 83 S.E. 2d 559 (1954).
3. Furman University v. Glover, *supra* at 4.
4. McManaway v. Clapp, 150 S.C. 249, 148 S.E. 18 (1929).
5. 226 S.C. 165, 84 S.E. 2d 375 (1954).

Description of Land

In *Richardson v. Register*[6] the court was confronted with the problem of a latent ambiguity in the description contained in a deed of land. Plaintiff owned a tract which had been conveyed to him by a deed describing the tract only as 43.8 acres bounded by lands of A, B, C, and D, without giving courses and distances. However, the description did refer to a plat "which plat is made a part of this description," and also identified the land as "the same tract which was owned by [AJJ]." At the time of the sale and conveyance to plaintiff the southeast corner of the tract was in doubt, and plaintiff agreed with an agent of the owners of the land to the south that on the plat being made for plaintiff (the plat referred to in the deed), the boundary would be located as the agent thought it to be, subject to relocation if such boundary was later found to be incorrect. Defendant subsequently purchasing this land to the south, plaintiff sued to determine the boundary between the tracts.

Affirming judgment on a verdict for plaintiff, the court found the description in plaintiff's deed to contain a latent ambiguity (the identification of the land as "the same tract which was owned by [AJJ]" was by a preponderance of the evidence at variance with the location of the southeast boundary on the plat), and extrinsic evidence to establish the disputed boundary, therefore, was admissible. The court recognized "that where the dividing line between two coterminous owners is doubtful and to establish it they meet together and agree on a line the agreed line must be regarded in all future controversies to be the true line." However, this principle was found to be inapplicable since the testimony was to the effect that the parties contemplated a readjustment of the line should the one designated on the plat later prove to be erroneous.

In *Plummer v. Plummer*[7] the court was concerned with the proper construction of a devise ". . . to my sons, A and B, the tract of land known as the home place, consisting of 63 acres, more or less, share and share alike, which shares I have determined and have by deeds conveyed each share to them." A survey made after the testator's death disclosed the tract to contain 70 38/100 acres. In a previous action for partition by A against B, in which there had been no appeal, it had been decreed that two deeds executed by the testator to A and B individually, but which were ineffectual as conveyances

6. 87 S.E. 2d 40 (S.C. 1955).
7. 226 S.C. 344, 85 S.E. 2d 189 (1954).

because of nondelivery, were to be construed as a part of the will.[8] Descriptions in these deeds made it clear that the testator intended B to receive the northern half of the tract and A the southern half, each deed purporting to convey 32 acres, more or less. Preambles in the deeds recited that the testator was conveying "my lands . . . to my children and heirs, in the acreage and description that I intend each heir or child shall receive." Subsequent to the first action the present one was brought to determine the boundary line between the parties. Division into two tracts of equal acreage would result in B having acreage of greater value, and A contended that the division should be by value rather than by acreage.

The Supreme Court agreed with the circuit judge that the division should be by acreage rather than by value. Earlier South Carolina authority[9] to the effect that a devise of a tract of land to two persons "to be equally divided between them" contemplates equality of value and not equality of acreage was recognized. However, even assuming the language here used by the testator, *i. e.*, "share and share alike," to be equivalent, the court held such earlier authority to be inapplicable because of additional language used by the testator. The first action determined that the ineffective deeds were to be construed as part of the devise. Descriptions in these deeds showed an intention to give the sons equal acreage (32 acres each — what was thought to be one-half of the tract), and the deeds recited an intention to convey *"in the acreage* . . . that I intend each child . . . shall receive." (emphasis by the court).

Dower

In *Shelton v. Shelton*[10] the South Carolina court aligned itself with the great weight of authority in holding a wife not to be entitled on account of her inchoate right of dower to have any portion of an award to her husband upon a condemnation of his land either paid to her directly or set aside for her benefit upon the contingency of her surviving her husband.[11] The opinion contains a valuable discussion of the nature and incidents of the inchoate right of dower as adjudicated in the South Carolina cases.

8. Although unappealed from, it would seem that the decree in the first action was correct in that an intention to incorporate the deeds by reference was manifested and the identification of the deeds was sufficient. *Cf.* Lawrence v. Burnett, 109 S.C. 416, 96 S.E. 144 (1918). Had the Court not found the deeds to have been incorporated by reference it could be argued that the devise would fail because of indefiniteness.

9. Sanderson v. Bigham, 40 S.C. 501, 19 S.E. 71 (1894).

10. 225 S.C. 502, 83 S.E. 2d 176 (1954).

11. See notes 5 A.L.R. 1347 (1920); 101 A.L.R. 697 (1936).

Fixtures

In *Carrol v. Britt*[12] a wife had placed on a farm of her husband three buildings (a combination residence and store, a pack house, and a wash house) owned by her. Together with her husband and their two minor daughters she lived on the farm and utilized the buildings for some two years, after which she separated from her husband and moved off the land, taking the children with her. About two years after the separation she obtained a divorce from her husband. Shortly thereafter he died intestate, leaving the two daughters as his sole heirs, whereupon the ex-wife resumed her occupancy of the land. Apparently in the belief that she was an heir of the decedent, she gave a mortgage of her "interest" in the land. In an action brought to approve a partition settlement between the daughters, and to exclude any claims of the ex-wife and her mortgagee (who defaulted), she answered, alleging her ownership of the buildings by reason of an agreement between her and her husband that the buildings were to remain her personal property after installation on the land.

The Master ruled that the buildings in question were of the kind which customarily are installed for the permanent enhancement of the value of land. Also, that the wife was not a tenant of the husband, and the installations were not to be treated as trade fixtures. Since the Master found insufficient evidence of the alleged agreement that the buildings were to remain the personal property of the wife, he concluded that they had become fixtures to the land, and, therefore, that the ex-wife no longer had an interest therein. The circuit judge disagreed with the Master and concluded that the evidence sufficiently established the existence of the alleged agreement. On appeal, however, the Supreme Court reversed the circuit decree and affirmed the report of the Master.

Partition

Turner v. Byars[13] was a suit to partition a lot of land among the respondents, the heirs of the deceased owner. The appellant, a third person in possession, was made a party defendant, the complaint alleging that he "now occupies the house on the above described land and makes some claim thereto." The appellant answered, setting up that he was in possession under an installment contract to purchase made by him with an agent of the respondents, and further alleging payments pursuant to the contract and valuable improvements made

12. 86 S.E. 2d 612 (S.C. 1955).
13. 85 S.E. 2d 100 (S.C. 1954).

by him. Specific performance of the contract was demanded, or, if that could not be had, that he be reimbursed for his payments and the value of the improvements.

On motion of the respondents the circuit judge required appellant to deposit monthly sums for the privilege of continued occupancy of the premises, funds so deposited to be applied on the purchase price should appellant succeed in establishing the contract, otherwise to be applied as rent; that should appellant fail to make the payments, respondents might apply for an order of ejectment. Further, the circuit judge, on his own motion, referred the matter to the Master. Thereafter appellant failed to make the required payments, and the Sheriff was directed to eject him.

On appeal the Supreme Court held invalid the order requiring appellant to make monthly payments, and providing for his ejectment in the event of nonpayment. Such action was tantamount to the appointment of a receiver, said the court, and while under some circumstances such appointment in a partition action is proper, it should not be done when, as here, though nominally for partition, the action in fact is against an occupant in undisturbed possession under claim of equitable title. The court further found an insufficient showing to authorize such order had been made. There was no allegation that appellant was in unlawful possession, or that he was insolvent or committing waste. The pleadings were unverified, and respondents offered no affidavits to contradict the allegations of appellant's answer.

However, despite appellant's claim that he was entitled to a jury trial, the case was held properly to have been referred to the Master. The court said that the basic issue was not as to the legal title, which admittedly was in respondents, but appellant's right to specific performance of the alleged contract of purchase, relief which is equitable in nature.

Wilson v. Cooper[14] reaffirmed[15] the validity in South Carolina of a parol partition of land, the court stating, "It is well settled in this State that valid partition of lands may be made by parol where there is sufficient part performance to take the transaction out of the Statute of Frauds. And actual possession is deemed the most satisfactory evidence of part performance."

The evidence disclosed that in 1913, pursuant to an oral agreement for the partition of the land, the heirs of an intestate landowner had the land surveyed and a plat prepared showing the agreed division,

14. 86 S.E. 2d 59 (S.C. 1955).
15. The court cites a number of earlier cases to the same effect.

and went into possession of their respective shares. This was held sufficient evidence of the consummation of the partition agreement, despite the fact that thereafter the property continued to be carried on the tax books in the name of the estate of the ancestor, and that later conveyances by certain of the heirs described the interests conveyed as undivided interests.

In *Thompson v. McGill*[16] the court affirmed the circuit decree dismissing the complaint in a partition action in which certain defendants set up sole title in themselves. The basis of plaintiffs' appeal was that the referee had erred in permitting these defendants to introduce in evidence the record of a certain deed despite plaintiffs' prior notice that they would object to such introduction of the record on the ground that the deed was a forgery, plaintiffs' contention being that the service of such notice rendered the record of the deed inadmissible under CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 26-105, 26-106.[17]

The opinion of the court bases the affirmance on deficiencies in the record, which record the court found to disclose no interest of the plaintiffs in the land. Three justices concurred in the result, one of them in a separate opinion stating that the record of the deed was properly admitted under the common law rules of evidence for proof of lost papers in accordance with CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-805,[18] and that §§ 26-105 and 26-106 were inapplicable.

16. 85 S.E. 2d 867 (S.C. 1955).

17. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-105:
"Production of instruments required to be recorded evidence of execution and recording.
The production, without further or other proof, of the original of any instrument in writing (other than a will) required by law to be recorded shall be prima facie evidence of the execution and recording of such instrument if such instrument shall have been recorded in the manner and place and within the time prescribed by law for recording the same and the recording thereof shall have been certified by the clerk of court or register of mesne conveyances and if the party or his attorney so producing any such recorded instrument shall have given at least ten days' previous notice in writing to the opposite party or his attorney of his intention so to produce any such recorded instrument with a description of the same."
§ 26-106. "Section 26-105 not applicable when fraud alleged.
The provisions of § 26-105 shall not apply when any such recorded instrument is assailed or attacked on the ground of fraud in its execution if at least ten days' previous notice in writing of such ground by a pleading or otherwise duly sworn to shall have been given by the party or his attorney so assailing or attacking such instrument to the opposite party or his attorneys."

18. CODE OF LAWS OF SOUTH CAROLINA, 1952.
§ 26-805. "Other proof of lost papers.
Nothing herein contained shall prevent anyone from establishing on the trial of any cause any lost papers, according to the rules of evidence existing at common law."

Rescission

In *Owens v. Sweat,*[19] a suit to rescind an exchange of real estate, the Supreme Court agreed with the circuit judge (who had reversed the Master) that the plaintiff had made a showing sufficient to warrant such relief. Rescission was sought on the ground of fraud, inadequate consideration, mental incapacity, and undue influence, and the defendant's answer was, in effect, a general denial and a plea of the statute of frauds with respect to any agreement to recovery.

The evidence was to the effect that the plaintiff, an illiterate farmer over 60 years of age whose mental abilities had been lessened by a paralytic stroke, had conveyed his farm (worth ten to twelve thousand dollars or more) to defendant, a younger and more experienced man and a trusted friend, for a recited consideration of seven thousand dollars, accepting in exchange therefor a conveyance to his wife of a house and lot worth four thousand dollars, and defendant's mortgage, also to his wife, on the farm in the sum of three thousand dollars. The testimony further established that the plaintiff's apparent purpose in the transaction was to clear his property of any dower claim in a former wife,[20] and that the conveyance had been made upon defendant's promise to reconvey if requested to do so by plaintiff within a specified period, which agreement defendant had repudiated when plaintiff demanded a reconveyance.

Affirming the circuit decree, the court quoted therefrom the following: "The inadequacy of consideration in conjunction with the mental incapacity, undue influence and the fraud practiced by defendant, requires the granting of the relief as asked by plaintiff."

Zoning

In *Application of Groves*[21] the court again[22] had occasion to consider the always difficult question of the propriety of a grant by a municipal board of adjustment of a variance from a zoning ordinance as authorized under CODE OF LAWS OF SOUTH CAROLINA,

19. 86 S.E. 2d 886 (S.C. 1955).

20. Apparently no contention was made that plaintiff's conveyance having been made for the fraudulent purpose of depriving his first wife of her dower interest, a court of equity should refuse relief. See All v. Prillaman, 200 S.C. 279, 307, 20 S.E. 2d 741 (1942). Even though it had been made however, it appears that such contention would not have availed the defendant. See Lyon v. Bargiol, 212 S.C. 266, 47 S.E. 2d 625 (1948).

21. 85 S.E. 2d 708 (S.C. 1955).

22. Prior cases are Talbot v. Myrtle Beach Board of Adjustment, 222 S.C. 165, 72 S.E. 2d 66 (1952); Hodge v. Pollock, 223 S.C. 342, 75 S.E. 2d 752 (1953).

1952 § 47-1009 (3)[23].

The Charleston Board of Adjustment, over the objection of certain residents, authorized the construction of a "water front, seafood restaurant" on a lot in a residential district leased by the applicant from the State Ports Authority. The objecting residents brought certiorari, but the circuit court concurred in a finding by a special referee that such variance should be permitted.

On appeal, the Supreme Court set aside the action of the Board, and reversed the order of the circuit court. The court said that a restaurant, regardless of the type, is properly excluded from a residential area. After reviewing the evidence, the court concluded, "Not only is there no proof that the particular property under consideration suffers a singular disadvantage from the operation of the zoning ordinances, but on the contrary, it affirmatively appears that any disadvantage to the same is suffered generally by the entire area of which this is but a small part." The opinion then quotes from Corpus Juris Secundum[24] to the effect that unless the property suffers some unusual hardship different from and greater than that suffered by other property, a variance is not warranted. The court further observed that at best the applicant had made out only a doubtful case for variance, and quoted from an earlier case[25] as follows, "This [power to grant variance] is an exceptional power which should be sparingly exercised and *can be validly used only where a situation falls fully within the specified conditions.*" (emphasis by the court.)

Justice Oxner dissented from the judgment of the court. In his opinion, "the proof shows that the property in question suffers a singular disadvantage through the operation of the zoning regulations. Indeed, the undisputed facts are to the effect that it can never be used for residential purposes. The denial of a variance in this case has the practical effect of confiscating the property of the State Ports Authority."

23. CODE OF LAWS OF SOUTH CAROLINA, 1952.
§ 47-1009. "General powers of board.
The board of adjustment shall have the following powers:

* * *

(3) To authorize upon appeal in specific cases such variance from the terms of any ordinance as will not be contrary to the public interest when owing to special conditions a literal enforcement of the provisions of such ordinance will result in unnecessary hardship and so that the spirit of such ordinance shall be observed and substantial justice done."

24. 62 C.J.S., Municipal Corporations, § 227 (11), p. 536.

25. Devaney v. Board of Zoning Appeals, 132 Conn. 537, 45 A. 2d 828, 829 (1946), quoted in Hodge v. Pollock, 223 S.C. 342, 349, 75 S.E. 2d 66 (1952).

Personal Property

Floyd v. Burden[26] involves a claim and delivery action to recover possession of certain pin tables which had been seized by the defendant as chief of police, apparently in the mistaken belief that they were illegal gambling devices. The testimony was that the plaintiffs were the owners of the tables and had placed them in business places owned by others under an agreement for the division of money played into the tables, and that the tables were in the possession of the owners or operators of the places of business where they were seized. The trial judge granted plaintiffs' motion for judgment, and the question on appeal was whether he should have granted defendant's motion for directed verdict on the ground that the plaintiffs had not showed themselves to be entitled to possession of the tables.

Affirming judgment for the plaintiffs, the Supreme Court said that evidence of ownership of personal property raises a presumption of the owner's right to possession. That not only was there nothing in the testimony to rebut this presumption, but it was to be inferred from the facts that the owners of the pin tables were entitled to take possession at any time, the proprietors of the business places being mere "local custodians". The court found inapplicable earlier South Carolina cases[27] involving unsuccessful suits against third parties by bailors for a term brought during the period of the bailment term.

In *Stephens v. Hendricks*[28] the court held the plea of bona fide purchaser for value, without notice, under the bailment statute,[29] to be an affirmative defense which must be pleaded and proved by the party thereon relying.

That the statutory lien[30] upon a motor vehicle which has been attached in an action for personal injury or property damage resulting from its wilful or negligent operation, survives the vehicle's release from the attachment pursuant to the filing of a bond, was decided in *Stephenson Finance Co. v. Burgess*.[31] The bond which had secured the vehicle's release having become worthless before the injured party's subsequently obtained judgment had been satisfied, the court held that the statutory lien was not discharged by the under-

26. 85 S.E. 2d 861 (S.C. 1955). A companion case is Ewing v. Burden, 85 S.E. 2d 862 (S.C. 1955).
27. Steele v. Williams, Dudley 16 (S.C. 1837); Bell v. Monahan, Dudley 38 (S.C. 1837).
28. 83 S.E. 2d 634 (S.C. 1954).
29. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-308.
30. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 45-551.
31. 226 S.C. 79, 82 S.E. 2d 512 (1954).

taking in release of the attachment, and that the judgment creditor might still proceed against the vehicle by execution and sale under his statutory lien, and thus maintain priority over the holder of a chattel mortgage on the vehicle.

Legislation

Four acts of the 1955 session of the General Assembly are worthy of mention in this review of developments in the South Carolina law of property.

By act[32] approved 11 March 1955, it is provided that "[b]eginning Dec. 7, 1941, any commissioned officer of the Armed Forces of the United States or any officer of the United States Merchant Marine, serving either within or without the limits of the United States, is authorized to verify pleadings, probate deeds and mortgages, take renunciations of dower, proofs of claims and to otherwise act in the same capacity as a notary public. When acting as such the officer shall sign his name, rank, serial number and organization and in such cases no official seal shall be necessary."

By act[33] approved 14 April 1955, it is provided that "[w]hen any last will . . . is filed with the probate court having jurisdiction a certified copy of same shall likewise be filed with the judge of probate of every county of the state where the deceased owned real estate." The act further provides "that the legal representative of the estate shall not be discharged until showing is made . . . that the provisions of this section have been complied with."

By act [34] approved 11 March 1955, § 57-103,[35] providing that no alien or corporation controlled by aliens shall own or control more than five hundred acres of land within the State, was amended to provide that in counties containing not less than twelve hundred square miles such aliens or corporations may own or control not more than six hundred and fifty acres of land.

By act[36] approved 29 April 1955, § 19-52[37] was amended by the addition of a new subsection providing, under certain circumstances, that stepchildren shall inherit from the decedent. A full discussion of this amendment will be found in Professor Karesh's Survey of Wills.

32. 49 STAT. 88 (1955).
33. 49 STAT. 191 (1955).
34. 49 STAT. 98 (1955).
35. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-103.
36. 49 STAT. 309 (1955).
37. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-52.