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Property

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Adverse Possession

The facts in *Crotwell v. Whitney*[1] suggest, but make it unnecessary to answer, adverse possession questions as yet not expressly decided in South Carolina. The rule in this State, contrary to the view of the overwhelming majority of jurisdictions, is that even though there be privity by deed or devise between successive adverse occupants of land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations.[2] Such tacking has been permitted, however, in the case of a continuation by the heir of the possession of the ancestor dying intestate.[3] Whether further exceptions to the no-tacking rule will be permitted remains to be decided.[4]

In the *Crotwell* case defendant's remote grantor purchased at a tax sale the interest in land of a life tenant.[5] Fifteen

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1. 229 S. C. 213, 92 S. E. 2d 473 (1956).

2. Crotwell v. Whitney, *supra* note 1, and the cases therein cited. For the rule of most jurisdictions, see 4 TIFFANY, REAL PROPERTY § 1146 (1939). If the adverse claimant is asserting title under the twenty year common law presumption of a grant the South Carolina cases do permit tacking. Thomson v. Peake, 7 Rich. 353 (1854); Sutton v. Clarke, 59 S. C. 440, 38 S. E. 150 (1901). See Haithcock v. Haithcock, 123 S. C. 61, 68, 115 S. E. 727 (1923). Likewise, the forty year statute (§ 10-129) permits a "possession . . . sole or connected . . . ". See Sutton v. Clarke, *supra.*

3. Epperson v. Stansill, 64 S. C. 485, 42 S. E. 426 (1902). The rationale is that while the new entry of a purchaser by deed or devise breaks the continuity of adverse possession, the heir is in of the ancestor's possession by operation of law.

4. It would seem that by operation of the doctrine of worthier title, tacking should be permitted when the devise is to the heir of the testator. See the authorities collected in Means, *Words of Inheritance in Deeds of Land in South Carolina,* 5 S. C. L. Q. 313, 355, note 152 (1953). *But cf.* Burnett v. Crawford, 50 S. C. 161, 27 S. E. 645 (1897), wherein the problem seems not to have been properly presented to the Court.

5. Defendant's contention that the tax debtor owned the land in fee simple rather than for life was found without merit. In so concluding the Court applied the incorporation by reference doctrine to embody within the deed to the tax debtor the terms of a devise. Incidentally, this devise contains no words of inheritance, nor does the Court's opinion disclose that such words were in the deed in question. Whether the incorporation by reference of a devise without words of inheritance is sufficient to supply their omission in a deed is doubtful. See Means, *Words of Inheritance in Deeds of Land in South Carolina,* 5 S. C. L. Q. 313, 321 note 30 (1953). The problem seems immaterial in the instant

years after the death of the life tenant the remaindermen, who were under no disability when their action accrued at the life tenant's death, sued defendant to recover the land. Defendant, who had been conveyed the purported legal title within eight years prior to the suit, sought to tack his grantor's possession and thus establish title by adverse possession under the ten year statute of limitations.

Defendant advanced two theories to escape the South Carolina no-tacking rule. First, that both defendant and his grantor held the land as trustees under a secret trust, and that as successor trustee under the trust he should be permitted to tack the possession of the prior trustee. Second, that the equitable interest in the alleged secret trust having continued for more than ten years in the original beneficiary and his heirs by descent, the equitable interests of ancestor and heir might be tacked and adverse possession thereby established.

In affirming judgment for plaintiff remaindermen the Supreme Court indicated that policywise it did not favor plaintiff's argument that the tacking of equitable interests under a secret trust should be permitted. Basis for the decision, however, is that the evidence did not establish either that defendant and his grantor held title as trustees rather than beneficially, or that the alleged equitable interest had passed by descent rather than by purchase. Nevertheless, even assuming that the Court had found the facts to be as defendant alleged them, it is difficult to see how, under the logic of the South Carolina cases, tacking of the possessions of defendant and his grantor could have been permitted.[6]

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case, however, as the deed was executed pursuant to court order. *Cf.* Carolina Savings Bank v. McMahon, 37 S. C. 309, 16 S. E. 31 (1892); Sumter Fertilizer Co. v. Baker, 206 S. C. 446, 34 S. E. 2d 681 (1945).

6. Basic principle of the trust concept, whether the trust be secret or overt, is that while the equitable interest is in the beneficiary, the trustee has legal title to the land or chattel which is the subject matter of the trust. Neel v. Clark, 193 S. C. 412, 8 S. E. 2d 740 (1940). RESTATEMENT, TRUSTS, § 2; SCOTT, TRUSTS, § 2.3 (2d ed.). Since he represents the legal title, the trustee must sue in trespass or ejectment. Among other cases, see Posey v. Cook, 1 Hill 413 (1833); Ayer v. Ritter, 29 S. C. 135, 7 S. E. 53 (1888); Epworth Orphanage v. Long, 199 S. C. 385, 19 S. E. 2d 481 (1942). Likewise, if the trustee is barred by the statute of limitations the beneficiary is also barred, despite the fact that he is under a disability, or that he has only an interest in remainder after the death of a still living equitable life tenant. Among other cases, see Pope v. Patterson, 78 S. C. 334, 58 S. E. 945 (1907); Young v. McNeil, 78 S. C. 143, 59 S. E. 986 (1907); Wells v. Coursey, 197

Cancellation of Deeds

Cox v. Tanner,[7] a case concerned with the effect on a conveyance by deed of a subsequent corrective deed executed by grantor to grantee, already has been the subject of a case note in the *South Carolina Law Quarterly*,[8] to which the reader is referred for a more detailed discussion. The facts were that land was conveyed to a husband alone by deed which was recorded. Thereafter the husband had the grantor execute to the grantee and his wife a second deed bearing on the back thereof the notation, "This is a correction Deed to take the place of a Deed [referring to the record of the prior deed]." The Court found the evidence to establish that the first deed had been made to the husband alone through error, and that the second deed unquestionably effectuated the intention of the parties. Later the wife died, devising all of her property to her husband for life, with remainder to her sisters. Upon the husband's death the wife's sisters sued for a determination that they owned one half of the land as tenants in common with the heir of the deceased husband, who denied their interest therein.

In affirming judgment for the plaintiffs, sisters of the wife, the Court adopted as its opinion the order of the circuit judge. The first deed was "given its full effect of taking the place of the prior deed . . . and the first deed is can-

S. C. 483, 15 S. E. 2d 752 (1941). See BOGERT, TRUSTS AND TRUSTEES § 954 (1948).

Necessarily a transfer from trustee to successor trustee, whether by court order or by deed, devise, or descent, involves a transfer of the legal title. This being so, it follows under the South Carolina view that unless the transfer takes place by descent from ancestor to heir, the new entry of the successor trustee breaks the continuity of the adverse possession. See notes 2, 3, *supra*. This would be true, it seems, despite the fact that the equitable interest continued in the same beneficiary. On the other hand, it appears that tacking the trustee's possession with that of his common law heir as successor trustee by descent would be permitted. Note 3, *supra*. [In South Carolina descent of the trustee's title is to the common law heir rather than the statutory heirs. Cone v. Cone, 61 S. C. 512, 39 S. E. 478 (1901); Karesh, *Devolution of Interests in Trust Estates*, 1 S. C. L. Q. 367, 397 (1949)]. Conversely, if the same party continued as trustee a transfer of the equitable interest would not break the continuity of the trustee's adverse possession.

Assuming that an adverse occupancy by a trustee has resulted in the acquisition of title by adverse possession, a further and most difficult question is whether the title thus acquired is held by the trustee in his own right, or in trust for the beneficiary. See Ballentine, 28 Yale L. J. 488, 506 (1919); BOGERT, TRUSTS & TRUSTEES, § 143 (1951). *Cf.* Anderson v. Rhodus, 12 Rich. Eq. 104 (1860).

7. 229 S. C. 568, 93 S. E. 2d 905 (1956).

8. 9 S. C. L. Q. 483 (1957).

celled and rescinded by operation of the agreement and intention of the parties themselves."

Estoppel en pais

McCauley v. Howard[9] is a case in which the trial court and the appellate court differed as to the possible applicability of the doctrine of equitable estoppel. The facts were that appellant's father died testate in 1944, devising a number of lots, including lot 18, to appellant, and other lots in close proximity thereto to appellant's brother. Upon the father's death the brother went into possession of lot 18, on which there was a dwelling, and continued his possession until 1948, when he sold and conveyed it to respondents, his tenants in possession, who purchased without an investigation of the title. Subsequent to their purchase respondents expended additional sums in making improvements. In 1954 appellant discovered that the lot which her brother had conveyed to respondents actually was situate within the area devised to appellant, whereupon she brought suit for possession.

On the trial the circuit judge ruled that appellant had title to the property if she had not lost it by estoppel, which issue he submitted to the jury.[10] The Supreme Court disagreed with this ruling and stated that there was "a total lack of any testimony to the effect that respondents relied on any representation, acts or nonacts of appellant or were misled in any way to change their position to their prejudice. Respondents did not have the title to the property investigated; had they done so they would have learned that the lot in question was devised to appellant . . . and that [appellant's brother] had no interest therein." The Court's conclusion that the evidence did not establish an estoppel seems sound.

Since appellant had not raised at the trial the question of her right to recover the rental value from respondents, the Court would not consider it on appeal. The lower court's judgment on a verdict for respondents was reversed, and the

9. 230 S. C. 140, 94 S. E. 2d 393 (1956).

10. Piedmont and Northern Ry. v. Henderson, 216 S. C. 98, 56 S. E. 2d 740 (1949), although factually distinguishable, would seem to lend support to the trial judge's ruling. The opinion in McCauley v. Howard makes no reference to the Henderson Case, however. The question is a complex one, but it may be that both the result and rationale of the McCauley Case conflict with the decision in Piedmont & Northern Ry. v. Henderson.

case remanded for a determination of the amount respondents were to be reimbursed for expenditures for taxes, insurance and improvements.

Judicial Sales — Setting Aside

In Re Paslay's Appeal[11] involves an attempt to set aside a judicial sale. At a partition sale of land owned by respondents, appellant, the only bidder, purchased the land for $450.00. Thereafter the circuit judge, on respondents' petition, restrained the master from conveying to appellant and required appellant to show cause why the restraining order should not be made permanent and the property resold. Allegations of respondents' verified petition were to the effect that respondents had been prepared through their attorney to bid $1,000.00 or more upon the sale, but that because of a mechanical failure of the automobile of respondents' attorney, the attorney had not arrived in time to make such bid for respondents. The petition further alleged that the property was worth one thousand dollars or more, and had a rental value of at least thirty dollars a month, and that consummation of the sale would result in irreparable loss to respondents.

Upon hearing appellant's return to the rule, the circuit judge refused to dissolve the restraining order, and referred the matter to have testimony taken as to the value of the property and the adequacy of the sales price.

On appeal the circuit court was reversed, the Supreme Court ruling that the injunction had been improvidently issued, and that respondents' petition should have been dismissed. The fact that respondents' attorney was unable to attend the sale because his automobile broke down was insufficient to justify setting aside the sale. As to the alleged inadequacy of price the Court said "it is well settled that mere inadequacy of price (unless it shock the conscience of the court) will not vitiate a judicial sale, in the absence of other factors for which the selling officer or the successful bidder was at least in part responsible, or participated." In the instant case no such factors were present, nor did the disparity between sales price and value shock the conscience of the Court. The opinion contains a detailed review of the South Carolina cases.

11. 230 S. C. 55, 94 S. E. 2d 57 (1956).

Obstruction of a Public Way as a Private Nuisance

In *Huggin v. Gaffney Development Co.*[12] the Court again[13] vindicates the right of a private citizen to sue for the obstruction of a public way. Damages and injunctive relief were sought in a complaint which alleged that a road connecting two state highways ran through lands of both plaintiff and defendant; that by reason of defendant's obstruction of the road plaintiff was denied access to state highway number eleven, and as a consequence was unable to procure farm labor and suffered a crop loss; also, that the closing of the road depreciated the value of plaintiff's property.

In reversing a circuit court order sustaining a demurrer to the complaint the Court said, "While ordinarily an indictment is the remedy for obstruction of a public highway, it is well settled 'that a private citizen may maintain a civil action for damages or abatement with respect to a public nuisance upon allegation and proof of such obstruction and of direct and special damages resulting to him, different in kind from what the public may sustain.'" The Court found the complaint to allege damages different in kind and degree from that suffered by the public generally. The Court further held that plaintiff's right to sue did not depend upon proof that he had made demand upon the public authorities for removal of the obstruction. Nor was there a defect of parties because plaintiff had not joined the owners of other property fronting on the road.

Specific Performance of Contract for Sale of Land

Butler v. Schilletter[14] involves a suit for specific performance of a contract to sell land and for damages sustained by reason of the vendor's refusal to convey. The vendor's answer admitted the contract alleged in the complaint and payment of the purchase price, but further alleged that the vendor would convey only if certain restrictions which should have been included in the contract were incorporated in the deed.

The Supreme Court held that the circuit judge properly refused to require the plaintiff to elect between a suit for specific performance and an action at law for damages. Plaintiff's suit was for specific performance, but in such suit he could recover special damages suffered as a result of the

12. 229 S. C. 340, 92 S. E. 2d 833 (1956).
13. A number of earlier cases are cited.
14. 230 S. C. 552, 96 S. E. 2d 661 (1957).

defendant's refusal to convey. Moreover, the circuit judge properly struck from the answer allegations as to restrictions not in the contract. The answer did not allege the land to be in a subdivision subject to recorded restrictions, nor did the defendant plead fraud, accident or mutual mistake. Therefore the written contract merged all prior negotiations and rendered inadmissible testimony to vary or contradict its terms. However, though the summary order for specific performance was proper, there was error in the refusal to permit the vendor's wife (who had been joined to bar her inchoate right of dower) to answer after overruling her demurrer to the complaint. Nor should the order have provided for a deposit with the Clerk of Court of the amount representing the value of the wife's inchoate dower interest. Such provision was premature, since after a hearing to determine the value of the dower interest the alternative method of securing such interest by a bond and mortgage on the land, as discussed in *Holly Hill Lumber Co. v. McCoy*,[15] might be preferable. As thus modified the circuit decree was affirmed.

Suit to Quiet Title

The general rule[16] that a claimant of legal title to land must be in possession when suing in equity to remove cloud on his title was applied to dispose of plaintiff's appeal in *Priester v. Brabham*,[17] an action to set aside a tax deed. The complaint of the plaintiffs, who were out of possession, was construed by the circuit judge to state only a cause of action for removal of cloud on title. On appeal the Court held that plaintiffs not having excepted to this ruling of the circuit judge, it became the law of the case. Therefore, the circuit decree dismissing the complaint was affirmed without a consideration of plaintiffs' exceptions.

Personal Property

Three cases falling within the personal property classification were decided during the survey period. One, *Grant v. Clinkscales*,[18] involved an action by a conditional vendee against his vendor for conversion of a television set. On appeal the evidence was held sufficient to sustain the jury's

15. 205 S. C. 60, 30 S. E. 2d 856 (1944).
16. Pollitzer v. Beinkemper, 76 S. C. 517, 57 S. E. 475 (1907); Morris v. Lambert, 218 S. C. 384, 62 S. E. 2d 841 (1950).
17. 230 S. C. 201, 95 S. E. 2d 167 (1956).
18. 230 S. C. 416, 95 S. E. 2d 854 (1957).

verdict for plaintiff in amount of $500.00 actual and $1,000.00 punitive damages.

The question presented in *Washington v. Western Auto Supply Co.*[19] is whether a judgment for the defendant in a claim and delivery action in which plaintiff took possession of the property precludes a subsequent independent action for damages by defendant for plaintiff's unlawful taking and detention.

The facts were that respondent, Western Auto Supply Co., in a claim and delivery action against appellant, Helen Washington, had posted bond and taken possession of personal property which was subject to chattel mortgages in default. Appellant's answer admitted the execution of the mortgages and the balance due thereon, but alleged that respondent had agreed to extend time for payment. Prayer of the answer was for return of the property or judgment for its value in case return could not be had, together with actual and punitive damages for the wrongful taking and detention.

On motion of respondent the trial judge struck from the answer the prayer for damages on the ground that the answer did not contain a counterclaim. The trial resulted in a verdict for appellant for possession of the property or its value, $400.00, if possession could not be had. Respondent appealed to the Court of Common Pleas, but the judgment of the trial court (Civil and Criminal Court of Charleston) was affirmed. Appellant did not appeal from the rulings by the trial judge.

Appellant then brought the present action to recover actual and punitive damages for the wrongful taking and detention of the property, her complaint alleging respondent's nonpayment of the judgment and refusal to return the property. Respondent demurred to the complaint for failure to state a cause of action in that the former judgment was conclusive of the matter. The trial judge overruled the demurrer, but on appeal he was reversed by the circuit judge.

On appeal the Supreme Court affirmed the circuit judge's order sustaining the demurrer. While recognizing that the cases from other jurisdictions are conflicting, the Court found the South Carolina Statutes[19a] "to contemplate the set-

19. 230 S. C. 424, 96 S. E. 2d 63 (1957).
19a. Code of Laws of South Carolina, 1952 §§ 10-1453, 10-2516.

tlement in one suit of all questions that might arise out of the unlawful taking or detention of the property and not a splitting of the cause of action for wrongful taking."

Appellant contended that since she had sought to adjudicate her claim for damages in the prior suit but had been prevented from doing so by respondent's motion to strike, respondent was now estopped to deny appellant's right to maintain the present action. This contention the Court found without merit, since assuming that the trial judge erred in refusing to submit to the jury the issue of damages, appellant's remedy was an appeal from the judgment rendered.

The Court found it unnecessary to decide appellant's contention that the present action was not barred by the prior judgment because it was a claim for damages for respondent's retention of the property subsequent to the judgment in claim and delivery. This was because in the claim and delivery action appellant had not entered judgment in the alternative for possession of the property or its value in case delivery could not be had, but had entered an unconditional money judgment. In accord with cited earlier cases this was held to waive appellant's right to the return of the property and entitle her only to payment of the amount of the judgment with interest and costs.

Whether sums paid to and on behalf of a widow by her stepsons were gifts or loans was one of the questions raised in *Meyerson v. Malinow*.[20] Although the testimony was conflicting, the master ruled that the sums paid had been intended as gifts, and this ruling was concurred in by the county judge. In affirming judgment on appeal, the Supreme Court invoked the rule that in an equity case findings of fact by a master which are concurred in by the county or circuit judge will not be disturbed unless "such findings are without any evidence to support them or are against the clear preponderance of the evidence." Other issues in the case are discussed in the survey of wills.

Cases Omitted

Several cases more appropriately classified in other sections of the annual survey have been omitted from the property section. One,[21] which is treated in the survey of secur-

20. 231 S. C. 14, 97 S. E. 2d 88 (1957).
21. Watson v. Little, 229 S. C. 486, 93 S. E. 2d 645 (1956).

ity transactions, is concerned primarily with the right of a mortgagee of land in possession, when an accounting is sought by the mortgagor, to offset the mortgage indebtedness despite the fact that the statute of limitations has run on the debt. Another case,[22] which involves an invalid town ordinance requiring all businesses to close at midnight, is discussed in the public corporations survey. Also included in the public corporations survey is *Stevenson v. Board of Adjustment*,[23] a case concerned with the grant of a variance from the terms of a municipal zoning ordinance.

Legislation

Sole property legislation within the survey period is an Act[24] approved July 1, 1957, providing for the registration of titles to motor vehicles. This Act, which is a modified version of a model act, is to take effect on January 1, 1958. For a discussion of certain of its features see the survey of security transactions.

Tangential to the property classification are two Acts,[25] approved June 18, 20, 1957, providing for an extension of the existing tax liens on personal property. These acts are more fully discussed in the survey of taxation.

22. Painter v. Town of Forest Acres, 231 S. C. 56, 97 S. E. 2d 71 (1957).
23. 230 S. C. 440, 96 S. E. 2d 456 (1957).
24. Acts 1957, No. 402.
25. Acts 1957, Nos. 368, 404.