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PROPERTY

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Adverse Possession of Timber Land

One of the most interesting cases decided during the survey period is *Mullis v. Winchester*,[1] in which the question presented was what acts are sufficient to constitute an adverse possession of timber land.

The facts were that in 1943 plaintiff purchased a tract of 310 acres for a consideration of $8,500. Plaintiff's vendor had purchased the tract at a void tax sale, and concededly plaintiff acquired no title by the conveyance to him. In 1957 plaintiff instituted this action against the heirs of the former owner pursuant to §§ 65-3301—65-3306,[2] to remove a cloud on and quiet title to the tract, plaintiff alleging that he had acquired title thereto by adverse possession under color of title. The answer of the defendant heirs denied the allegation of adverse possession.

The case was tried before a jury, and defendants presented no testimony. The testimony for plaintiff was as follows. Plaintiff was the owner of a lumber company, and had purchased the tract for the cutting and growing of timber thereon. Shortly after his purchase in 1943, plaintiff's representative contacted one of the defendant heirs and advised her that plaintiff had purchased the land and desired to obtain from her the plat thereof, which was in her possession. This plat the defendant heir delivered to plaintiff's representative for ten dollars, without at that time asserting any claim of ownership of the land by herself and the other heirs. Plaintiff then, with the help of adjoining landowners, had the tract surveyed. Thereafter, at a time the Court found "not definitely fixed in the testimony,"[3] plaintiff cut the mer-

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1. 237 S. C. 487, 118 S. E. 2d 61 (1961).

2. CODE OF LAWS OF SOUTH CAROLINA §§ 65-3301 — 65-3306 (1952) which pertain to suits to clear tax titles.

3. On cross examination the testimony of plaintiff's timber buyer relative to the time of cutting was as follows: "About three years after we bought the timber." (R. 22). "I imagine it was about '46 . . . . Maybe not quite that long . . . . I don't know exactly when the place was cut." (R. 26) The witness admitted that although there were records in the office, he had not brought them, (R. 22) nor had he looked at them. (R. 26) The testimony of a neighboring landowner was equally vague and indefinite.

chantable timber (trees with a diameter greater than ten to twelve inches). The cutting was done by a crew of eight to ten men, and the timber cut was hauled away by three trucks which used woods roads upon the land; the cutting was accomplished in "more than one day and less than three months."[4] Plaintiff followed the same cutting practice on this tract as he did on other lands he owned; he cut infrequently because he considered it good forestry practice to cut only the larger trees. There was a second cutting of timber on the tract, but such took place after institution of plaintiff's suit in 1957. After his purchase plaintiff paid the taxes thereafter accruing, which were assessed in his name. The people in the community considered the land as belonging to plaintiff. The land was hilly, and timber growing was the best use to which it could be put.

The jury returned a verdict for defendants, but the trial judge set it aside and granted judgment for plaintiff *non obstante veredicto*. On appeal, *affirmed*, the Supreme Court agreed with the trial judge that the only inference to be drawn from the evidence was that plaintiff had acquired title by adverse possession. The Court said:

> Acts of adverse possession, or acts of ownership, with regard to open, wild, unfenced lands, lands not capable of cultivation, are only required to be exercised in such way and in such manner as is consistent with the use to which the lands may be put and the situation of the property admits of without actual residence or occupancy.
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> We think the trial judge was correct in concluding that the acts of adverse possession by [plaintiff] were sufficient to establish requisite continuity of possession for the statutory period of ten years, particularly in view of the use to which this tract of land could be put and the situation of the property. The [plaintiff] entered upon this land under color of title and possessed and occupied same for his ordinary use in obtaining timber therefrom and growing timber thereon. Section 10-2423 (3), 1952 Code of Laws of South Carolina.[5]

4. RECORD, p. 23.
5. CODE OF LAWS OF SOUTH CAROLINA § 10-2423 (1952) provides:
For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

Analyzing the evidence, it is difficult to regard any single item as conclusive on the issue of possession. Ordinarily the taking and recording of a void deed does not of itself place the grantee in adverse possession of the land purportedly conveyed, though it seems that in at least one jurisdiction the rule is otherwise if such grantee is claiming wild and unoccupied land under a recorded tax deed which, though void, is valid on its face.[6] Nor (anent the purchase of the plat from one of the heirs) does notice to the owner of land of a purported claim thereto alone start the running of the statute in favor of the claimant.

The isolated act of making a survey of land would seem a mere trespass rather than a continuing possession of the tract surveyed.[7] As a general rule, the cutting of timber as a single transaction on land is not regarded as the establishment of a continuing adverse possession.[8] Furthermore, in the instant case the Court was careful to note that the time of the cutting "is not definitely fixed in the testimony,"[9] so

(1) When it has been usually cultivated or improved;
(2) When it has been protected by a substantial enclosure;
(3) When, although not enclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry or for the ordinary use of the occupant; and
(4) When a known farm or a single lot has been partly improved the portion of such farm or lot that may have been left not cleared or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

In several states it has been held that such a statute is in applicable unless the claimant is otherwise in actual possession of a part of the land. Note, *Cutting of Timber as Adverse Possession*, 170 A. L. R. 887, 923 (1947). In the instant case plaintiff had no such actual possession. While Bardin v. Commercial Insurance & Trust Co., 82 S. C. 358, 64 S. E. 165 (1909), would seem to impose no such requirement (the facts as well as the exact thrust on appeal are not clear), there the claimant apparently had made repeated cuttings. Moreover, in the instant case there was uncertainty as to the time of the single cutting. *Supra*, note 3.

6. See the Wisconsin cases cited in 22 A. L. R. 550, 553 (1923).

7. Alston v. McDowall, 1 McMul. 444 (1840); Slice v. Derrick, 2 Rich. 627 (1846).

8. To the effect that occasional entries to cut timber do not constitute a continuing actual possession, see Bailey v. Irby, 2 N. & McC. 343 (1820); White ads. Reid, 2 N. McC. 534 (1820); McBeth v. Donnelly, Dudley 177 (1838); Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co., 255 F. 645 (4th Cir. 1918). In 170 A. L. R. 887, 896 (1947) it is said, "The better rule is that one has actual possession of land during the time he actually conducts timbering operations on it." In the instant case, however, while the cutting was extensive, the actual occupancy during such cutting continued only "more than one day and less than three months."

9. *Supra*, note 3.

it cannot be inferred that more than ten years[10] thereafter had elapsed before action commenced.

It seems clear that payment of taxes alone is insufficient to give possession of land to the taxpayer,[11] nor does community repute as to the ownership of land confer either title or possession upon the reputed owner. Moreover, even though timber growing was the best use to which the land could be put, absent testimony (and there was none) as to some continuing acts of cultivation done on the land by the adverse claimant, it is difficult to see why the natural maturation of trees should establish a possession in the claimant rather than the landowner.[12]

Nevertheless, when the above facts are considered as a whole, together with certain additional matters pointed up in the transcript of record,[13] it would seem that the equities (the term is used in the popular sense) were loaded in favor of the adverse claimant. At best the concept of possession is an elastic one which in various contexts and for different purposes has a wide range of meaning.[14] In a situation such as was here presented the totality of the transaction is greater than the sum of its parts, and it would seem not unreasonable to conclude, for the purpose of protecting the claimant, that a jury would be warranted in finding he had established title by adverse possession.

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10. In South Carolina the period for acquisition of title to land by adverse possession is ten years. CODE OF LAWS OF SOUTH CAROLINA § 10-124 (1952).

11. See the cases collected in 2 C. J. 69, n. 78, (1915). See Gregg v. Moore, 226 S. C. 366, 85 S. E. 2d 279 (1954). See also McBeth v. Connelly, Dudley 177 (1838).

12. See CODE OF LAWS OF SOUTH CAROLINA § 10-242 (1952), which in part provides that ". . . the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law."

13. It appears that the tax sale was in 1939 or earlier (R. 48). There is no evidence that after the sale the defendant record owners manifested any interest in the land prior to the present suit in 1957, which was brought to enable plaintiff to mortgage the land as security for a loan. (R. 58).

14. The following comment in explanation of the varied meanings given possession seems relevant here:

> The primary object of a court of law is to achieve an acceptable solution of the particular controversy, which contending litigants have placed before it, and not to present a technically perfect exercise of logic. The courts ordinarily shape their logical devices to achieve desired ends, and do not discard a longed-for result in order to preserve the integrity of a syllogistic mechanism. BROWN, PERSONAL PROPERTY 20 (2d ed. 1955).

The further holding that adverse possession had been established as a matter of law is more debatable;[15] as is so often the case, what is to be considered beyond doubt may itself be doubted. On balance, possibly the decision is best explained as one *sui generis* and of little value as an exact precedent because of the peculiar factual situation which determined the result of the case.

Adverse Possession of Railway Right of Way

In *Smith v. Southern Ry.*[16] the defendant railway originally had fee simple title to a right of way through plaintiff's farm extending one hundred feet from the center of the track on each side. After plaintiffs acquired the farm, they maintained a fence on a line thirty-five feet west of the center of the track. In the summer the land within the fence was cultivated and in the winter it was used to graze cattle. Each spring the fence was removed to permit the use of tractors in cultivating, and after the crops were cultivated in the fall, the fence was replaced to confine the cattle.

After this practice had been continued for some fourteen years without objection from defendant, defendant's section master sought to stop plaintiffs from replacing the fence, he contending that it was on the railway's property. One of plaintiffs then told the section master that the land was plaintiffs', and, in effect, ordered the section master off the land. Thereafter plaintiffs, without further objection from defendant, continued their fencing practice for an additional twenty-five years, after which time they sued for damage to their crops growing within the fenced area. The case being submitted to a jury on special issues, the jury found that plaintiffs had acquired title to the sixty-five foot strip by adverse possession.

On appeal, the judgment for plaintiffs was affirmed. The Court discussed earlier cases to the effect that since a railway frequently has no immediate need for all of its right of way, the use for agricultural purposes such as grazing and cultivation of a portion of the way by an adjacent landowner ordinarily forms no basis for a claim of hostile possession, nor is the mere enclosure of a part thereof by a fence suffi-

15. As pointed out in note 3, *supra*, the testimony was quite vague on the important issue as to the year in which the timber was cut.
16. 237 S. C. 597, 118 S. E. 2d 440 (1961).

cient to put the railway on notice of a claim of adverse possession.

However, "if an adjacent landowner under a claim of ownership encloses a portion of right of way by a substantial fence and refuses upon demand to remove it . . . [s]uch an assertion of right to exclusive occupancy of the land . . . may form the basis of a claim of adverse possession." The Court then observed that while in most of the cases the railway had a mere easement, in the instant case "the claim of adverse possession is strengthened by the fact that [defendant] had fee simple title to its right of way."[17] In the Court's opinion, "the evidence fully warrants an inference that the period of adverse possession commenced running when [plaintiffs] told the section master that they owned the property and replaced the fence over his protest."

Relative to defendant's contention that the continuity of any adverse possession was broken each spring when the fence was removed, the Court quoted earlier cases to the effect that actual possession once taken will continue despite temporary absences of the possessor until he be disseised, or until he does some act amounting to an abandonment of possession. Viewing the facts in the instant case, the Court opined, "We cannot say as a matter of law . . . that [plaintiff's possession] was broken each year by the removal of the fence. Not only was there a seasonal operation with the *animo revertendi* always present but when the fence was removed [plaintiffs] continued to occupy the property by cultivation of the land."

Disputed Boundary—Adverse Possession and Acquiescence

Lynch v. Lynch[18] was an action of trespass to try title to a disputed area between adjoining tracts owned by plaintiff

17. Relative to the presumption that the use of a portion of a railway right of way by an adjacent landowner is permissive and not adverse, it was said in Blume v. Southern Ry., 85 S. C. 440, 443, 67 S. E. 546, 547 (1910):

> The fact that defendant [railroad] owns the fee in the land, and not merely an easement, can make no difference; for if defendant cannot alien or lose by prescription an easement acquired by purchase or condemnation, neither can it alien or lose by prescription the fee in the right of way acquired by purchase. It is not the character of the estate, but the public purpose for which it was acquired, and with which it is burdened, which takes it out of the general rule.

18. 236 S. C. 612, 115 S. E. 2d 301 (1960).

and defendant respectively. The answer of the defendants denied title in the plaintiffs and set up title in themselves by adverse possession and presumption of a grant. The trial of the case resulted in judgment on a verdict for plaintiff, which was affirmed on appeal.

The Court found that the trial judge was correct in holding as a matter of law that the evidence established legal title to be in the plaintiff. This being true, the Court pointed out that "[w]here a person proves legal title to property, the person so proving the legal title is presumed to have been in possession of the land within ten years."

There was conflicting testimony as to the length of time defendants and their predecessor had used the locus, as well as testimony from which it might be concluded that defendants had occupied the land under the mistaken belief that it was part of the adjoining tract which they owned. In commenting on a charge of the trial judge as to the effect of an occupancy of land under mistaken belief of ownership, the Court stated:

> . . . that the occupancy of land beyond the true boundary line, by an encroaching owner, does not form a basis for adverse possession, unless the encroachment is made with an intention to claim and hold adversely. Where one [who] is in the possession of land up to a supposed line intends to claim only to the true line, his possession is not hostile and will not ripen into title.

A further charge "that if adjoining land owners occupy their respective premises up to a certain line which they recognize as the boundary line between the tracts, . . . they are precluded from claiming the line is not the true line . . ." evoked the comment, "It is well settled that a boundary line dividing the land of adjoining owners may be established by a parol agreement of such owners, and such becomes conclusive against the owners and those claiming under them." As against defendants' contention that verdict should have been directed in their favor, the Court found that the circuit judge properly had submitted the case to the jury, since "[t]he evidence was in dispute and more than one inference could be drawn therefrom."

Adverse Possession Against a Tenant in Common

In South Carolina the well established rule is that as against a claim of adverse possession under the ten year statute of limitations[19] by one tenant in common against his co-tenants, the possession of the occupying tenant is presumed to be in recognition of, rather than hostile to, the interests of his co-tenants. The presumption may be rebutted by evidence of an ouster of the co-tenants, but the acts relied upon to establish such ouster "must be of unequivocal nature, and so distinctly hostile to the rights of the other co-tenants that the intention to disseize is clear and unmistakable."[20]

However, if it is shown that for twenty years or more there has been an exclusive possession with the use and exercise of authority incident to exclusive and adverse ownership, such evidence "is sufficient to rebut the presumption that possession is in subordination to the legal title, and to establish the presumption of a grant or deed, and almost any other presumption necessary to the protection of the possession."[21]

In *Horne v. Cox*,[22] the defendant co-tenant asserting title by adverse possession had been in exclusive possession for seventeen years prior to institution of suit for partition,[23] during which time he allegedly had held himself out as sole owner and had exercised the authority incident to such ownership. Under the facts of the case, however, the Court found no evidence that notice of an ouster had been given his co-tenants, and therefore the trial judge's direction of verdict against the claimant of exclusive title by adverse possession was affirmed. "Only in rare cases, which may be said to be extreme," stated the Court, "has it been held that ouster of the other co-tenants was implied from exculsive possession,

19. CODE OF LAWS OF SOUTH CAROLINA § 10-124 (1952).
20. Among the many cases to this effect, see Wells v. Coursey, 197 S. C. 483, 15 S. E. 2d 752 (1941). See also Note, 11 S. C. L. Q. 520, 529 (1959).
21. Wells v. Coursey, *supra*, quoting Powers v. Smith, 80 S. C. 110, 61 S. E. 223 (1908). It seems that the presumption of ouster arising from twenty years possession is not conclusive, however, and ordinarily makes a question of fact for a jury. Whitaker v. Jeffcoat, 128 S. C. 404, 122 S. E. 495 (1924).
22. 237 S. C. 41, 115 S. E. 2d 513 (1960).
23. The Record (p. 87) discloses that the claimant asserted an exclusive occupancy after the death of his mother in 1937. Suit for partition was instituted in 1954.

collection of rents, and improvements of the property by one co-tenant."

Construction of Deeds—Rule in Shelley's Case

Smoak v. McLure[24] presented the Court with the problem of determining the interests created by an obviously home-drawn deed of land executed in 1909[25] by a father to his son. The consideration recited was "the sum of the love and affection I have for my son and one dollars" [sic]. The granting clause was "unto the said Ben Garris, his natural lifetime, then to heirs or next of kin in case he has no heirs." The habendum clause, which was regular in form, read "unto the said Ben Garris, and his heirs and assigns forever." The deed contained a general warranty "to Ben Garris or his heirs and assigns," and the renunciation of dower was "unto the within named Ben Garris, or his heirs or next nearest of kin heirs and assigns."

Disposition of the case in the circuit court is thus summarized by the Supreme Court:

> The Master to whom the case was referred concluded that the word 'heirs' in the granting clause was not used in its technical sense but to denote 'children'; that Ben Garris acquired only a life estate with remainder in fee to his children but if he 'died without leaving any children then the property would go to his next of kin'; that words of inheritance were not necessary as the deed should be construed as a covenant to stand seized to uses;[26] that this construction of the granting

24. 236 S. C. 548, 115 S. E. 2d 55 (1960).

25. CODE OF LAWS OF SOUTH CAROLINA § 57-2 (1952), which abolishes the rule in Shelley's case is inapplicable to instruments executed prior to October 1, 1924.

26. Since the rule in Shelly's case was held applicable on appeal, the Supreme Court found it unnecessary to determine whether or not the deed might otherwise have been construed as a covenant to stand seized to uses. Whether such construction would have been permissible is doubtful, in view of the fact that the grantor reserved no life estate in himself.

If the record had established (the Court's opinion points out that it did not) that the son had no living child at the time of the conveyance, it seems that despite the failure to reserve a life estate the deed might have been so construed. This, at least, was the opinion of Mr. Justice Cothran, the father of the South Carolina version of the covenant to stand seized to uses. See his concurring opinion in Wallace v. Taylor, 127 S. C. 121, 120 S. E. 838 (1924). See also the circuit decree of Circuit Judge W. H. Townsend in Campbell v. Williams, 171 S. C. 279, 172 S. E. 142 (1933). An alternative ground of the decision of Judge

clause rendered it in conflict with the habendum clause but under the well settled rule the former should prevail; and that appellants, the only living children of the grantee, were now vested with fee simple title. The report of the Referee was reversed by the Circuit Judge who held that the deed conveyed to Ben Garris fee simple title and that it was immaterial, in view of the fact that he had living children when he conveyed it, whether such title be regarded as a fee simple absolute or a fee conditional.

In affirming the circuit decree, the Supreme Court found ". . . no language sufficient to overcome the presumption that the word 'heirs' was used in its technical sense as a word of limitation."[27] The rule in Shelley's case applied to give an estate of inheritance to the grantee. Whether such estate was a fee simple or a fee simple conditional was immaterial, said the Court, as the grantee had children living when he thereafter undertook to convey a fee simple estate.

Townsend was that the deed there in issue (from a father to his daughter for life, and then to her surviving issue), which reserved no life estate to the grantor, could be construed as a covenant to stand seized to uses requiring no words of inheritance to convey the fee. On appeal, the decision of Judge Townsend was unanimously affirmed, the circuit decree being stated to be "entirely satisfactory to this Court," and its report ordered. In First Carolinas Joint Stock Land Bank v. Ford, 177 S. C. 40, 180 S. E. 562 (1935), the Court cited with approval this alternative ground of the holding in Campbell v. Williams, *supra*.

The reviewer has heretofore paid his respects to the question in an article, *Words of Inheritance in Deeds of Land in South Carolina: A Title Examiner's Guide*, 5 S. C. L. Q. 313, 337 (1953). As there stated, the reviewer knows of no South Carolina case which, on proper reading, is controlling as against the authorities cited in the second paragraph of this note.

27. It will be noted that the alternative limitation in the grant was to "next of kin in case he [the ancestor] has no heirs." When so used it would seem that both heirs and next of kin may not be assigned their primary meanings, since if the grantor had no general heirs he necessarily would have no next of kin. Even conceding that the grantor meant other than heirs general however, it would follow that heirs must be construed as heirs of the body or as issue, since it is improbable that the grantor intended his son's general heirs to take if the son were survived by grandchildren instead of by children. Cf. Woodle v. Tilghman, 234 S. C. 123, 107 S. E. 2d 4 (1959). [In the instant case, no additional language would allow the remainder to be read as one to children or their lineal representatives *per stirpes*, as in Bank of Prosperity v. Dominick, 116 S. C. 228, 107 S. E. 914 (1921).] Since the rule in Shelley's case still would apply if heirs were construed as heirs of the body or as issue, as pointed out by the Court, the result in the instant case would be the same under either construction.

Judicial Sales—Partition

In *Bennett v. Floyd*,[28] the Court, in rejecting an attack on a partition action which had been unassailed for more than thirty years, relied on the principle that:

> . . . the purchaser in good faith at a judicial sale is bound only to see that the Court had jurisdiction of the subject of the action and of the parties in interest. He is not affected by irregularities or errors in the record for which the judgment might have been vacated in a direct attack, or reversed on appeal, or by secret vices affecting the judgment, which are not disclosed by examination of the record.[29]

Evidence that an affidavit of service contained in the record was false was found to be insufficient. On this point the Court quoted *Singleton v. Mullins Lumber Co.*:[30]

> Due proof of service appears in the record of the foreclosure proceeding. Such a record, standing as it has for approximately half a century, may not be overthrown by less than the clearest and most convincing evidence. To hold otherwise would be a dangerous thing, imperiling titles to real estate and other rights long since adjudicated; it would, moreover, be contrary to precedent unbroken in the history of our jurisprudence. Even though proof of service were wholly lacking, it would be presumed that the Court that rendered the judgment would not have done so without proper proof of the service of the summons in the cause.

Nor did the record support appellant's contention that one of the heirs of the deceased owner had been omitted in the partition action.

An argument that the partition decree was invalid because the Court was without power to allot one tenant in common his share in kind while ordering a sale of the remainder was found to be without merit. "While we have found no case in this State passing precisely upon the question now under consideration," said the Court, "the general authority elsewhere is that a court of equity under proper circumstances

28. 237 S. C. 64, 115 S. E. 2d 659 (1960).
29. The quotation by the Court is from Gladden v. Chapman, 106 S. C. 486, 91 S. E. 796 (1917).
30. 234 S. C. 330, 342, 108 S. E. 2d 414, 420 (1959).

may allot a part of the land to one co-tenant and order the remainder sold for division among the other co-tenants." No statute impairing this inherent equitable power was found.

Finally, the contention that the land had been sold at a grossly inadequate price as a result of fraudulent collusion between certain parties to the partition action was found not to have been established. Moreover, "[i]f there existed such a conspiracy," the Court stated, "it was a vice which could not have been discovered by an examination of the record and, therefore, could not affect a bona fide purchaser."

Partition

In *Mallow v. Watson*[31] the owner of an undivided one-half interest in land, within six months after the death of the owner of the other undivided one-half interest, brought the instant action for partition against the heirs of the deceased. Certain of these heirs already had sued to partition other lands of the deceased (to which suit the plaintiff in the instant action was not a party), and these heirs moved to stay all proceedings in the instant action until the final determination of the prior partition action, and for a further order staying all proceedings until the expiration of six months from the date of the death of the deceased.

In affirming the circuit court's refusal to stay the proceedings, the Supreme Court pointed out that plaintiff in the instant action had no interest in the lands sought to be partitioned in the prior action, and that subject to an exception not presented by the facts, "[t]he general rule is that where it is sought to partition several parcels of land, it is essential that each of the parties to the proceeding have an interest in the entire property." The Court further observed that it was "difficult to see any basis for [the heirs'] claim to a stay of the instant action when they failed to make [plaintiff] a party to the other action."

Relative to the heirs' contention that further proceedings should have been stayed until six months after the death of the deceased,[32] the Court pointed out that the period already

31. 237 S. C. 226, 116 S. E. 2d 689 (1960).
32. In *Ex parte Worley*, 49 S. C. 41, 26 S. E. 949 (1897), the Court declared it to be "a settled rule of practice . . . not to entertain a bill for partition until 12 months from the death of intestate. . . ." [Since

had expired during pending of the appeal. It was further noted that the administrators of the estate of the deceased had been made parties to the instant action as required by Circuit Court Rule 54, "and it will be assumed that in the partition decree proper provision will be made to protect the creditors, if any, of decedent's estate." The Court in addition commented that the appellant heirs were "hardly in a position to claim that the instant action was prematurely commenced when they themselves brought within the six months period an action to partition the other property owned by decedent."

Reservation of Power to Repurchase Land Conveyed

In *Byars v. Cherokee County*,[33] the defendant county had purchased from plaintiff a lot of land to be used as the site of a potato curing house. Pursuant to agreement of the parties, the deed of conveyance contained the following provision:

> Provided, that in case the said lot of land shall cease to be used by the County of Cherokee for curing house purposes that the said Forrest Byars shall have the right to repurchase the said lot of land and have same reconveyed to him upon payment of the said purchase price of $50.00, Cherokee County to have the right to remove therefrom at that time, any improvements placed on the said land if desired.

A curing house was erected on the lot, but when the county later ceased to use it for such purpose plaintiff then requested a reconveyance as provided in the deed. Thereafter the

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the amendment of CODE OF LAWS OF SOUTH CAROLINA § 19-554 (1952), (Act No. 767 of 1956) to permit suits against an executor or administrator within six months, it seems that the period prescribed in *Worley* now would be six months.] See also Horton v. Horton, 214 S. C. 141, 51 S. E. 2d 425 (1949); Smith v. Pearson, 210 S. C. 524, 43 S. E. 2d 479 (1947). In Connor v. McCoy, 83 S. C. 165, 65 S. E. 257 (1909), an action to marshall assets and for partition was held to be maintainable within twelve months, the Court saying: "The rule there laid down [in *Ex parte Worley*] was that such an action (for partition) is premature unless the administratrix be a party or provision is made for debts. This action [in *Connor*] was by the administratrix and was for ascertainment and payment of debts primarily." And in Gladden v. Chapman, 106 S. C. 486, 91 S. E. 796 (1917), the Court pointed out ". . . it is only a rule of practice, and, while the failure to observe it may have been error, which would have been corrected on application to the Court or on appeal from the judgment, clearly it was not a jurisdictional defect."

33. 237 S. C. 548, 118 S. E. 2d 324 (1961).

County Board of Commissioners sold the curing house building at public auction, and reconveyed the lot to plaintiff for the sum of $50.00. Plaintiff purchased the building from the purchaser at the auction sale, and used the lot and building at public auction, and reconveyed the lot to plaintiff for highway purposes. Plaintiff then sued for judicial affirmation of his title to the lot and building and an adjudication that he alone was entitled to the proceeds of the condemnation award. Defendant contended that the acts of the Board of Commissioners were void and *ultra vires,* and that the conduct of plaintiff and the board constituted a fraud upon the taxpayers of the county.

In affirming the lower court decree for plaintiff the Supreme Court held that defendant county was bound to make the reconveyance, and that it was barred by laches and estoppel from repudiating it. The estate conveyed by the deed was characterized as one on condition subsequent, the Court saying:

> The condition stated in the deed in this case, giving the grantor by the express words used, the right to a reconveyance of the property should the appellant cease to use the land for curing house purposes, is a condition subsequent, and upon the happening of the event stated entitled the grantor to a reconveyance of the property.

Assuming that the repurchase provision made the estate conveyed the grantee one on condition subsequent, the decision of the Court would seem to be the correct one. However, it may be that the deed should have been construed to create a repurchase option in the grantor rather than an estate on condition subsequent, since the privilege reserved by the grantor was exercisable only upon the payment of money, and the grantee obligated itself to execute a deed of reconveyance.[34] One difference in the legal effect of the two is that while the right of entry reserved by the grantor upon conveyance of an estate on condition subsequent is not subject to the rule against perpetuities,[35] an option to repurchase reserved by the grantor is void if capable of being exercised beyond the period of the rule.[36]

34. RESTATEMENT, PROPERTY § 394 comment c (1940); BURBY, REAL PROPERTY § 174 (2d ed. 1954).
35. 5 POWELL, REAL PROPERTY § 769 (1956). The English authority is *contra. Ibid.*
36. 5 POWELL, REAL PROPERTY § 779 (1956).

In the instant case, if it be assumed that the repurchase privilege was exercisable only within the period of the rule against perpetuities,[37] it would seem that the provision was valid, whether it be construed as a repurchase option or as a right of entry for breach of condition subsequent.

Vendor and Vendee—Action for Fraud and Deceit

Lancaster v. Smithco, Inc.[38] was an action for fraud and deceit by the vendees against the vendors of a house and lot. The vendors had conveyed by a general warranty deed which described the land conveyed by specific reference to a recorded plat as well as by metes and bounds. The plat referred to showed that the lot conveyed was subject to an easement ninety feet wide across the rear of the lot for the installation of pipe lines, but the deed made no mention of the easement. The vendees testified that they relied solely on the warranty and did not inspect the plat nor have the title examined; and they had no knowledge of the easement until some time after their purchase.

The trial resulted in judgment for the plaintiffs and a verdict for actual damages. On appeal, the Supreme Court remanded the case for entry of a non-suit in accordance with Supreme Court Rule 27, on the ground that the vendees had failed to prove that the vendors intended to deceive them, proof of which fact is an essential element in an action for fraud and deceit. The Court observed that the vendees had relied solely upon the warranty in the deed to prove a false representation with intent to deceive, but "[i]n this case we are of the opinion that the general warranty does not justify a finding of an intent to deceive." The Court expressly withheld its opinion as to whether or not the evidence would justify a finding of a breach of warranty.

A number of cases which are discussed in detail in other sections of the annual survey have been omitted from the

37. It should be noted that an option to purchase land is not necessarily bad merely because no time limit has been specified. It may be that a proper interpretation of the contract would be to the effect that it is to be exercised in a reasonable time, which, in most cases, would be less than twenty-one years. Or it may be that the option was to be personal to the one to whom it was given. If that be true, of course, it is good, since it would be exercised in his lifetime.

SIMES & SMITH, FUTURE INTERESTS § 1244 (2d ed. 1956) (footnotes omitted).

38. 238 S. C. 15, 119 S. E. 2d 145 (1961).

property section. One[39] which is treated in the wills section, held that in an action for partition in kind of the realty of a decedent, one of the heirs could not file a counter claim for services allegedly rendered the decedent during her lifetime by that heir. Also included in the wills section is *Austin v. Summers*,[40] an action by an administrator to recover the decedent's alleged one-half interest in a joint account in a savings and loan association.

A third case,[41] an action to enjoin the maintenance in a residential area of a business establishment constructed in reliance on a void grant of a variance, is discussed in the public corporations section. Also discussed under public corporations is *Derby Heights, Inc. v. Gantt Water District*,[42] in which it was held that plaintiffs, developers of subdivisions who had constructed water lines under streets they had conveyed to the county, were entitled to compensation from the defendant water district, which had taken over operation of the water lines, on the theory that defendant had exercised its power of eminent domain.

Discussion of *Davis v. Cordell*,[43] a suit by a vendor to have a contract for the sale of land adjudged void for uncertainty and cancelled because of purchaser's failure to perform within a reasonable time, will be found under contracts.

Legislation

Two statutes[44] pertaining to renunciations of inchoate dower interests in land were enacted by the 1961 General Assembly.

Requirement That Notary Public Affix His Official Seal to Renunciations of Dower Within the State

Act No. 217[45] strikes out the general section[46] dealing with dower renunciations and substitutes therefor a shorter section intended, as indicated by the act's title, "to simplify the provisions relating to renunciation of dower." Prior to

39. Watson v. Watson, 237 S. C. 274, 117 S. E. 2d 145 (1960).
40. 237 S. C. 613, 118 S. E. 2d 684 (1961).
41. Aughtry v. Farrell, 237 S. C. 604, 118 S. E. 2d 569 (1961).
42. 237 S. C. 144, 116 S. E. 2d 13 (1960).
43. 237 S. C. 88, 115 S. E. 2d 649 (1960).
44. Acts Nos. 217 and 244 of 1961.
45. 52 Stat. 416 (1961).
46. CODE OF LAWS OF SOUTH CAROLINA § 19-111 (1952).

amendment of the section there was an express provision[47] that renunciations taken by a notary public within the State were valid despite the failure of the notary to affix his official seal to the certificate of renunciation, and omission of the seal was common practice. However, the substituted section,[48] without making an exception in the case of renunciations taken within the State, provides in part: "The officer shall append to the writing his certificate in the form prescribed by § 19-114 [which details the form of the renunciation], and affix his official seal,[49] if any." In view of the mandatory form of the quoted language, it may be that renunciations taken within the State since the effective date (May 4, 1961) of the substituted statute are defective unless the notary's official seal was affixed.[50]

Certainly it is unlikely that the substituted statute was intended so drastically to alter a well established conveyancing practice, and it is probable that corrective legislation reaffirming (if not revalidating) the prior practice will be enacted during the next legislative session. If such legislation expressly undertakes to validate renunciations taken prior to its enactment,[51] it seems that it may operate retrospectively to cure a defect (assuming that such exists) arising because of omission of the notary's seal after May 4,

47. § 19-111 in part provided for renunciations taken within the State before a "notary public with or without official seal . . . ." The proviso was added to the section in 1922 (Act No. 524 of 1922). In Bratton v. Burris, 51 S. C. 45, 28 S. E. 13 (1897), the Court, construing an earlier text of the dower renunciation statute, held that omission of the notary's seal was a fatal defect, and that the invalid certificate did not estop the wife from obtaining dower.

48. *Supra*, note 45.

49. CODE OF LAWS OF SOUTH CAROLINA § 49-6 (1952) provides: "Each notary public shall have a seal of office, which shall be affixed to his instruments of publication and to his protestations. But the absence of such seal shall not render his acts invalid if his official title be affixed thereto." Should the question be litigated, it, of course, is possible that the Court may construe § 49-6 in *pari materia* with Act No. 217. See Bratton v. Burris, 51 S. C. 45, 50, 28 S. E. 13 (1897). Cf. First Presbyterian Church of York v. York Depository, 203 S. C. 410, 422, 27 S. E. 2d 573 (1943). If this is done, renunciations not under the official seal of the notary taken since May 4, 1961, are valid because of the second sentence of § 49-6, *supra*.

50. See Bratton v. Burris, *supra*. See also 39 AM. JUR., *Notary Public* §§ 34, 35 (1942). But see the second sentence of CODE OF LAWS OF SOUTH CAROLINA § 49-6 (1952) set out in note 49, *supra*.

51. The amendment of 1922 (Act No. 524 of 1922) in part undertook to validate dower renunciations not under official seal of the notary taken within the State before the amendment. [This provision of the amendment is one of several provisions now embodied in CODE OF LAWS OF SOUTH CAROLINA § 19-116 (1952).] No case considering the amendment has been found.

1961, and before passage of the corrective act, provided that the grantor is alive on the effective date of the act.[52] However, in the event that the grantor does not survive until enactment of a corrective statute, since the dower interest of the wife would have become consummate rather than inchoate, it is doubtful that subsequent legislation could operate to defeat her vested interest.[53]

Absent such curative legislation and assuming that Act No. 217 altered the prior law, one may question[54] whether a dower renunciation taken without affixing the notary's seal subsequent to May 4, 1961, may be corrected other than by taking a new renunciation if the husband is alive,[55] or, if he be dead, other than by obtaining a deed from his widow.[56]

Renunciation of Dower on Land to be Conveyed or Mortgaged by Power of Attorney

Act No. 244[57] permits renunciations of dower on lands to be conveyed or mortgaged under powers of attorney by the wives of persons executing such powers. In general, the prescribed form of the renunciation is similar to that provided for renunciations of dower by the wives of grantors and mortgagors of land.[58]

52. See Note, 20 A. L. R. 1330 (1922); 17A AM. JUR., *Dower* § 9 (1957).
53. See Note, 20 A. L. R. 1330, 1333 (1922); 17A AM. JUR., *Dower* § 10 (1957).
54. Whether the notary's affixation of his seal subsequent to delivery of the deed can operate to cure the imperfect renunciation is not clear. See 39 AM. JUR., *Notary Public* § 34 (1942), and certain of the cases collected in 74 Am. Dec. 368, 369 (1911); 46 C. J., *Notaries* § 35 (1928). Cf. Scanlon v. Turner, 1 Bail. 421, 425 (1830).
55. CODE OF LAWS OF SOUTH CAROLINA § 19-112 (1952).
56. Jefferies v. Allen, 29 S. C. 501, 7 S. E. 828 (1888); Bethune v. McDonald, 35 S. C. 88, 14 S. E. 674 (1892).
57. Act No. 244 of 1961.
58. CODE OF LAWS OF SOUTH CAROLINA § 19-116 (1952).