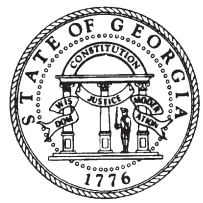
OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

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The Code Revision Commission
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and
The Editorial Staff of LexisNexis®



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Title 23. Equity

Including Acts of the 2020 Session of the General Assembly of Georgia
and Annotations taken from the Georgia Reports
and the Georgia Appeals Reports

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THE STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

I, Brad Raffensperger, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as the same appear on file and record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 18th Day of September, in the year of our Lord Two Thousand and Twenty and of the Independence of the United States of America the Two Hundred and Forty-Fifth.

Brad Raffensperger

Brad Raffensperger, Secretary of State

Preface

This volume cumulates and replaces the original edition of Volume 19 of the Official Code of Georgia Annotated, as supplemented by the 2019 Cumulative Supplement. The original Volume 19 and its 2019 Supplement may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Titles 22 and 23 by the General Assembly through the 2020 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through August 7, 2020. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; John Marshall Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice; American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2018, 2019, and 2020 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2018 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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Law reviews. — For article discussing eminent domain procedure in this country, and advocating reforms focusing on a unified method for condemnation, see 11 Mercer L. Rev. 245 (1960). For article, "Eminent Domain, Police Power and Urban Renewal: Compensation for Interim Depreciation in Land Values," see 7 Ga. L. Rev. 226 (1972). For article discussing extraterritorial condemnation of property by municipalities, see 12 Ga. L. Rev. 1 (1977). For article discussing developments in the law of eminent domain in 1976 to 1977, see 29 Mercer L. Rev. 219 (1977). For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979). For article surveying Georgia cases in the area of local government law from June 1979 through May 1980, see 32 Mercer L. Rev. 137 (1980). For article, "A Critical Review of the Law of Business Loss Claims in Georgia Eminent Domain Jurisprudence," see 51 Mercer L. Rev. 11 (1999).

For note on computation of compensation for condemned lands where value is enhanced by announcement of proposed improvement, see 15 Mercer L. Rev. 488 (1964). For note, "A Study of the Development and Current Status in Georgia of Inverse Condemnation Suits by a Landowner for Taking by Aerial Flights," see 2 Ga. St. B.J. 232 (1965).

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Attorney fees are not available in condemnation actions. DOT v. Worley, 244 Ga. 783, 263 S.E.2d 436 (1979).

RESEARCH REFERENCES

Am. Jur. Trials. — Condemnation of Rural Property for Highway Purposes, 8 Am. Jur. Trials 57.

Condemnation of Urban Property, 11 Am. Jur. Trials 189.

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Cited in Elberton S. Ry. v. State Hwy. Dep't, 211 Ga. 838, 89 S.E.2d 645 (1955); Fountain v. Metropolitan Atlanta Rapid Transit Auth., 179 Ga. App. 318, 346 S.E.2d 363 (1986).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Eminent Domain: Lessee's Recovery of Compensation for Taking of Leasehold Interest, 56 POF3d 419.

Eminent Domain: Proof of Lack of Reasonable Necessity for Taking of Property, 71 POF3d 97.

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Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 1 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 1 et seq.

22-1-1. Definitions.

As used in this title, the term:

(1) "Blighted property," "blighted," or "blight" means any urbanized or developed property which:

(A) Presents two or more of the following conditions:

(i) Uninhabitable, unsafe, or abandoned structures;

(ii) Inadequate provisions for ventilation, light, air, or sanitation;

(iii) An imminent harm to life or other property caused by fire, flood, hurricane, tornado, earthquake, storm, or other natural catastrophe respecting which the Governor has declared a state of emergency under state law or has certified the need for disaster assistance under federal law; provided, however, that this division shall not apply to property unless the relevant public agency has given notice in writing to the property owner regarding specific harm caused by the property and the owner has failed to take reasonable measures to remedy the harm;

(iv) A site identified by the federal Environmental Protection Agency as a Superfund site pursuant to 42 U.S.C. Section 9601, et seq., or environmental contamination to an extent that requires remedial investigation or a feasability study;

(v) Repeated illegal activity on the individual property of which the property owner knew or should have known; or

(vi) The maintenance of the property is below state, county, or municipal codes for at least one year after notice of the code violation; and

(B) Is conducive to ill health, transmission of disease, infant mortality, or crime in the immediate proximity of the property.

Property shall not be deemed blighted because of esthetic conditions.

(2) "Common carrier" means any carrier required by law to convey passengers or freight without refusal if the approved fare or charge is paid.

(3) "Condemnor" or "condemning authority" means:

(A) The State of Georgia or any branch or any department, board, commission, agency, or authority of the executive branch of the government of the State of Georgia;

(B) Any county or municipality of the State of Georgia;

(C) Any housing authority with approval of the governing authority of the city or county as provided in Code Section 8-3-31.1;

(D) Any other political subdivision of the State of Georgia which possesses the power of eminent domain; and

(E) All public utilities that possess the right or power of eminent domain.

(4) "Economic development" means any economic activity to increase tax revenue, tax base, or employment or improve general economic health, when the activity does not result in:

(A) Transfer of land to public ownership;

(B) Transfer of property to a private entity that is a public utility;

(C) Lease of property to private entities that occupy an incidental area within a public project; or

(D) The remedy of blight.

(5) "Each person with a legal claim" means the owner of the property or of any remainder, reversion, mortgage, lease, security deed, or other claim in the property.

(6) "Interest" means any title or nontitle interest other than fee simple title.

(7) "Persons" means individuals, partnerships, associations, and corporations, domestic or foreign.

(8) "Property" means fee simple title.

(9)(A) "Public use" means:

(i) The possession, occupation, or use of the land by the general public or by state or local governmental entities;

(ii) The use of land for the creation or functioning of public utilities;

(iii) The opening of roads, the construction of defenses, or the providing of channels of trade or travel;

(iv) The acquisition of property where title is clouded due to the inability to identify or locate all owners of the property;

(v) The acquisition of property where unanimous consent is received from each person with a legal claim that has been identified and found; or

(vi) The remedy of blight.

(B) The public benefit of economic development shall not constitute a public use.

(10) "Public utility" means any publicly, privately, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, power, electricity, light, heat, gas, oil products, water, steam, clay, waste, storm water not connected with highway drainage, and other similar services and commodities, including publicly owned fire and police and traffic signals and street lighting systems, which directly or indirectly serve the public. This term also means a person, municipal corporation, county, state agency, or public authority which owns or manages a utility as defined in this paragraph. This term shall also include common carriers and railroads.

History. — Ga. L. 1929, p. 219, § 3; Code 1933, § 36-201; Ga. L. 2006, p. 39, § 3/HB 1313; Ga. L. 2017, p. 774, § 22/HB 323.

Cross references. — Fee simple estates generally, § 44-6-20 et seq.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U. L. Rev. 157 (2006). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

For comment on Botts v. Southeastern Pipeline Co., 190 Ga. 689, 10 S.E.2d 375 (1940); Harrell v. Southeastern Pipeline Co., 190 Ga. 709, 10 S.E.2d 387 (1940), see 3 Ga. St. B. J. 49 (1941).

JUDICIAL DECISIONS

An easement was a compensable property interest in a condemnation action. Lee v. City of Atlanta, 219 Ga. App. 264, 464 S.E.2d 879 (1995).

Bad faith standard properly applied. — Trial court did not err in upholding a special master's decision granting a county's petition to condemn a property owner's land because the trial court properly concluded that the special master's application of the bad faith standard was appropriate; the trial court found that even if the special master had applied the abuse or misuse of discretion standard, no evidence of record supported such a finding on the part of the county. Brunswick

Landing, LLC v. Glynn County, 301 Ga. App. 288, 687 S.E.2d 271 (2009), cert. denied, No. S10C0558, 2010 Ga. LEXIS 246 (Ga. 2010).

No bad faith shown on part of county. — Record supported that the condemnation of the buffer property would serve a public purpose and that the county did not act in bad faith because failing to disclose the extent of methane migration provided no financial benefit for the county since at no time did the county discount the price the county was offering the property owner for the buffer property due to ignorance of the status of methane migration. Morgan County v. Gay, 352 Ga. App. 555, 834 S.E.2d 576 (2019), cert. denied, No. S20C0331, 2020 Ga. LEXIS 380 (Ga. 2020); cert. denied, No. S20C0495, 2020 Ga. LEXIS 390 (Ga. 2020); cert. denied, No. S20C0332, 2020 Ga. LEXIS 398 (Ga. 2020).

Cited in State Hwy. Dep't v. H.G. Hastings Co., 187 Ga. 204, 199 S.E. 793 (1938); Botts v. Southeastern Pipe-Line Co., 190 Ga. 689, 10 S.E.2d 375 (1940); Harrell v. Southeastern Pipe-Line Co., 190 Ga. 709, 10 S.E.2d 386 (1940).

RESEARCH REFERENCES

ALR. — Power to establish building line along street, 28 A.L.R. 314; 44 A.L.R. 1377; 53 A.L.R. 1222.

Right of public body to compensation where property held by it is taken for another public purpose, 56 A.L.R. 365.

22-1-2. Nature of right of eminent domain; property to be put to public use.

(a) The right of eminent domain is the right of this state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of this state on account of public exigency and for the public good. Thus, in time of war or insurrection the proper authorities may possess and hold any part of the territory of this state for the common safety. Notwithstanding any other provisions of law, except as provided in Code Section 22-1-15, neither this state nor any political subdivision thereof nor any other condemning authority shall use eminent domain unless it is for public use. Public use is a matter of law to be determined by the court and the condemnor bears the burden of proof.

(b) Except as provided in Code Section 22-1-15, no condemnation shall be converted to any use other than a public use for 20 years from the initial condemnation.

(c)(1) Except as provided in Code Section 22-1-15, if property acquired through the power of eminent domain from an owner fails to be put to a public use within five years, the former property owner may apply to the condemnor or its successor or assign for reconveyance or quitclaim of the property to the former property owner or for additional compensation for such property. For purposes of this subsection, property shall be considered to have been put to a public use at the point in time when substantial good faith effort has been expended on a project to put the property to public use, notwithstanding the fact that the project may not have been completed. The

application shall be in writing, and the condemnor or its successor or assign shall act on the application within 60 days by:

(A) Executing a reconveyance or quitclaim of the property upon receipt of compensation not to exceed the amount of the compensation paid by the condemnor at the time of acquisition; or

(B) Paying additional compensation to the former owner of the property, such compensation to be calculated by subtracting the price paid by the condemnor for the property at the time of acquisition from the fair market value of the property at the time the application is filed.

(2) If the condemnor fails to take either action within 60 days, the former property owner may, within the next 90 days following, initiate an action in the superior court in the county in which the property is located to reacquire the property or receive additional compensation.

(3) The condemnor shall provide notice to each former owner of the property prior to acquisition if the condemnor fails to put such property to a public use within five years. The condemnee shall have one year from the date notice is received to bring an application under this subsection.

(d) When property is acquired from more than one owner for the same public use and reconveyance or additional compensation to a single owner is impracticable, any party to the original condemnation or each person with a legal claim in such condemnation may file an action in the superior court in the county in which the property is located for an equitable resolution.

(e) This Code section shall not apply to condemnations subject to Code Section 22-3-162 or Title 32.

History. — Orig. Code 1863, § 2201; Code 1868, § 2196; Code 1873, § 2222; Code 1882, § 2222; Civil Code 1895, § 3052; Civil Code 1910, § 3624; Code 1933, § 36-101; Ga. L. 2006, p. 39, § 4/HB 1313; Ga. L. 2017, p. 754, § 1/HB 434.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U. L. Rev. 157 (2006). For article on the 2017 amendment of this Code section, see 34 Ga. St. U. L. Rev. 201 (2017). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008). For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009).

For comment on Botts v. Southeastern Pipeline Co., 190 Ga. 689, 10 S.E.2d 375 (1940); Harrell v. Southeastern Pipeline Co., 190 Ga. 709, 10 S.E.2d 387 (1940), see 3 Ga. B.J. 49 (1941); State Hwy. Dep't v.

Lumpkin, 222 Ga. 727, 152 S.E.2d 557 (1966), see 3 Ga. St. B. J. 483 (1967).

JUDICIAL DECISIONS

Taking property for public use is legislative, not judicial, function. — The necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so when the state takes for the state's own purposes. State Hwy. Dep't v. Smith, 219 Ga. 800, 136 S.E.2d 334 (1964).

Notice to owner not required before determination of necessity. — Since the necessity for taking private property for a public use is a legislative and not a judicial function, due process does not require notice to the owner nor an opportunity to be heard before such determination can be made. State Hwy. Dep't v. Smith, 219 Ga. 800, 136 S.E.2d 334 (1964).

Eminent domain statutes to be strictly construed. — Since the power to take private property for a public use or benefit is in derogation of the right of the citizen, statutes under which it is claimed must be strictly construed, and it is generally held that the power is not conferred unless an intention to that effect appears in clear and express terms, or by necessary implication. Botts v. Southeastern Pipe-Line Co., 190 Ga. 689, 10 S.E.2d 375 (1940), commented on in 3 Ga. B.J. 49 (1941).

The exercise of the right of eminent domain is a legislative function, and the powers delegated by the General Assembly thereunder must be exercised in strict conformity with the statute. DOT v. Worley, 150 Ga. App. 768, 258 S.E.2d 595, aff'd and modified on other grounds, 244 Ga. 783, 263 S.E.2d 436 (1979).

No right to take land for private use. — The power of eminent domain may never be used to acquire property to be used by private individuals solely for private use and private gain. City of Atlanta v. Atlanta Gas Light Co., 144 Ga. App. 157, 240 S.E.2d 730 (1977).

Right rests largely in discretion of exercising authority. — In the absence of bad faith the exercise of the right of eminent domain rests largely in the discretion of the authority exercising such right, both as to necessity and amount. City of Atlanta v. First Nat'l Bank, 154 Ga. App. 658, 269 S.E.2d 878 (1980).

Substituted condemnation. — When property is condemned for exchange with another public utility, and the property will be used for a public purpose, this is called "substituted condemnation," and this is a valid exercise of the condemnor's power of eminent domain. City of Atlanta v. Atlanta Gas Light Co., 144 Ga. App. 157, 240 S.E.2d 730 (1977).

A taking for redevelopment is a taking for a public purpose. Nations v. Downtown Dev. Auth., 225 Ga. 324, 338 S.E.2d 240 (1985).

Cessation of work on project after notifying property owner of possible condemnation. — After the Department of Transportation informed a corporation in the spring of 1981 that a building leased by the corporation would be condemned for highway purposes, but later all work on the proposed highway, including all condemnation actions in progress, was halted, and the corporation sought to recover from the department the corporation's loss of an advantageous leasehold interest, as well as expenses involved in moving, since the corporation had been advised that no move was required before September 1982, and that written notification would precede a required removal, the corporation's decision to move in August 1982 was by voluntary choice, and could not be attributed to an interference by the department with the corporation's exclusive rights of ownership, use and enjoyment. Hence, whether the corporation's action was characterized as direct or inverse condemnation, the losses claimed did not result from an exercise of eminent domain. Josh Cabaret, Inc. v. DOT, 256 Ga. 749, 353 S.E.2d 346 (1987).

Cited in Felton v. State Hwy. Bd., 51 Ga. App. 930, 181 S.E. 506 (1935); Williamson v. Housing Auth., 186 Ga. 673,

199 S.E. 43 (1938); Housing Auth. v. Savannah Iron & Wire Works, Inc., 90 Ga. App. 150, 82 S.E.2d 244 (1954); Central of Ga. R.R. v. Georgia Pub. Serv. Comm'n, 257 Ga. 217, 356 S.E.2d 865 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Legislature may authorize municipality's acquisition of land beyond its limits. — Legislature has the power to authorize a municipal corporation to acquire lands beyond the municipal limits and for that purpose to exercise the power of eminent domain when the proposed taking of private property is strictly for public use. 1965-66 Op. Att'y Gen. No. 66-65.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 1 et seq., 44 et seq.

Am. Jur. Proof of Facts. — Eminent Domain: Proof of Lack of Reasonable Necessity for Taking of Property, 71 POF3d 97.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 1 et seq., 27 et seq.

ALR. — Exercise of eminent domain for purpose of irrigating land of private owner, 9 A.L.R. 583; 27 A.L.R. 519.

Right to condemn property previously condemned or purchased for public use, but not actually so used, 12 A.L.R. 1502.

Exercise of eminent domain to control the use or improvement of property not taken, 23 A.L.R. 876.

Constitutionality of statute conferring power of eminent domain on private corporation or association for educational, religious, or recreational purpose, 50 A.L.R. 1530.

Constitutionality of statute or ordinance denying right of property owners to defeat a proposed street improvement by protest, 52 A.L.R. 883.

Public benefit or convenience as distinguished from use by the public as ground for the exercise of the power of eminent domain, 54 A.L.R. 7.

Right of public body to compensation where property held by it is taken for another public purpose, 56 A.L.R. 365.

Exercise of eminent domain to preserve places of historical interest, 59 A.L.R. 945.

Power to condemn, or authorize the condemnation of, capital stock of a public utility, 81 A.L.R. 1071.

Diversion of park property to other uses as taking or damaging neighboring property without compensation, 83 A.L.R. 1435.

State power of eminent domain as affected by interstate character of uses to which property taken is to be devoted, 90 A.L.R. 1032.

Obstruction or diversion of, or other interference with, flow of surface water as taking or damaging property within constitutional provision against taking or damaging without compensation, 128 A.L.R. 1195.

Retention, by building or other fixture, of its character as real property, for purposes of statute authorizing condemnation of real property, notwithstanding agreement treating it as personalty, 151 A.L.R. 1429.

Condemnation of public utility property for public utility purposes, 173 A.L.R. 1362.

Electric light or power line in street or highway as additional servitude, 58 A.L.R.2d 525.

Right to condemn property in excess of needs for a particular public purpose, 6 A.L.R.3d 297.

Substitute condemnation: power to condemn property or interest therein to replace other property taken for public use, 20 A.L.R.3d 862.

Eminent domain: right to enter land for preliminary survey or examination, 29 A.L.R.3d 1104.

Eminent domain: validity of appropriation of property for anticipated future use, 80 A.L.R.3d 1071.

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 A.L.R.4th 765.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

Eminent domain: Public taking of sports or entertainment franchise or organization as taking for public purpose, 30 A.L.R.4th 1226.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property, 62 A.L.R.4th 1183.

Validity of extraterritorial condemnation by municipality, 44 A.L.R.6th 259.

22-1-3. Power of General Assembly to determine when right of eminent domain may be exercised; duty of courts as to laws authorizing the condemnation of private property for private uses.

It is the province of the General Assembly to determine when the right of eminent domain may be exercised. If, however, under pretext of such necessity the General Assembly should pass a law authorizing the taking of property for private use rather than for public use, the courts should declare the law inoperative.

History. — Orig. Code 1863, § 2202; Code 1868, § 2197; Code 1873, § 2223; Code 1882, § 2223; Civil Code 1895, § 3053; Civil Code 1910, § 3625; Code 1933, § 36-102.

JUDICIAL DECISIONS

Taking property for public use is legislative, not judicial, function. — The necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so when the state takes for the state's own purposes. State Hwy. Dep't v. Smith, 219 Ga. 800, 136 S.E.2d 334 (1964).

Legislature has exercised jurisdiction granted by section. — In the exercise of the jurisdiction granted by this section, the legislature passed acts which are embodied in former Code 1933, § 36-102 (see O.C.G.A. § 22-1-3) as former Code 1933, §§ 36-801 and 85-1306 (see O.C.G.A. §§ 44-8-4 and 22-3-20). Central Ga. Power Co. v. Ham, 139 Ga. 569, 77 S.E. 396 (1913).

Notice to owner not required before determination of necessity. — Since the necessity for taking private property for a public use is a legislative and not a judicial function, due process does not require notice to the owner nor an opportunity to be heard before such determination can be made. State Hwy. Dep't v. Smith, 219 Ga. 800, 136 S.E.2d 334 (1964).

Cited in Williamson v. Housing Auth., 186 Ga. 673, 199 S.E. 43 (1938); Russell v. Venable, 216 Ga. 137, 115 S.E.2d 103 (1960); Norton Realty & Loan Co. v. Board of Educ., 129 Ga. App. 668, 200 S.E.2d 461 (1973); DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 5, 23 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 1 et seq., 23 et seq.

ALR. — Exercise of eminent domain to control the use or improvement of property not taken, 23 A.L.R. 876.

Right of abutting owner to compensation for interference with access by bridge or other structure in public street or highway, 45 A.L.R. 534.

Constitutionality of statute conferring power of eminent domain on private corporation or association for educational,

religious, or recreational purpose, 50 A.L.R. 1530.

Public benefit or convenience as distinguished from use by the public as ground for the exercise of the power of eminent domain, 54 A.L.R. 7.

Power to condemn, or authorize the condemnation of, capital stock of a public utility, 81 A.L.R. 1071.

Diversion of park property to other uses as taking or damaging neighboring property without compensation, 83 A.L.R. 1435.

Injunction against exercise of power of eminent domain, 133 A.L.R. 11; 93 A.L.R.2d 465.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

22-1-4. Manner in which General Assembly may exercise right of eminent domain.

The General Assembly may exercise the right of eminent domain directly through the officers of the state, through the medium of corporate bodies, or by means of individual enterprise.

History. — Orig. Code 1863, § 2203; Code 1868, § 2198; Code 1873, § 2224; Code 1882, § 2224; Civil Code 1895, § 3054; Civil Code 1910, § 3626; Code 1933, § 36-103.

Law reviews. — For note, "Regulation and Ownership of the Marshlands: The Georgia Marshlands Act," see 5 Ga. St. L. Rev. 563 (1971).

JUDICIAL DECISIONS

Taking property for public use is legislative, not judicial, function. — The necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so when the state takes for the state's own purposes. State Hwy. Dep't v. Smith, 219 Ga. 800, 136 S.E.2d 334 (1964).

Notice to owner not required before determination of necessity. — Since the necessity for taking private property for a public use is a legislative and not a judicial function, due process does not require notice to the owner nor an opportunity to be heard before such determination can be made. State Hwy. Dep't v. Smith, 219 Ga. 800, 136 S.E.2d 334 (1964).

Eminent domain statutes to be strictly construed. — Since the power to take private property for a public use or benefit is in derogation of the right of the citizen, statutes under which it is claimed must be strictly construed, and it is generally held that the power is not conferred unless an intention to that effect appears in clear and express terms, or by necessary implication. Botts v. Southeastern Pipe-Line Co., 190 Ga. 689, 10 S.E.2d 375 (1940).

Cited in Williamson v. Housing Auth., 186 Ga. 673, 199 S.E. 43 (1938); Russell v. Venable, 216 Ga. 137, 115 S.E.2d 103 (1960); Banks v. Georgia Power Co., 267 Ga. 602, 481 S.E.2d 200 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Legislature may authorize municipality's acquisition of land beyond its limits. — Legislature has power to authorize a municipal corporation to acquire lands beyond the municipal limits and for that purpose to exercise the power of eminent domain when the proposed taking of private property is strictly for public use. 1965-66 Op. Att'y Gen. No. 66-65.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 5, 21 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 1 et seq., 23 et seq.

ALR. — Condemnation by de facto corporation, 44 A.L.R. 542.

Constitutionality of statute conferring power of eminent domain on private corporation or association for educational, religious, or recreational purpose, 50 A.L.R. 1530.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

Eminent domain: measure and elements of damages or compensation for condemnation of public transportation system, 35 A.L.R.4th 1263.

22-1-5. Requirement of just compensation as a limitation on exercise of power of eminent domain.

Except in cases of extreme necessity and great urgency, the right of eminent domain cannot be exercised without first providing for just compensation to the owner for the interference with his exclusive rights.

History. — Orig. Code 1863, § 2204; Code 1868, § 2199; Code 1873, § 2225; Code 1882, § 2225; Civil Code 1895, § 3055; Civil Code 1910, § 3627; Code 1933, § 36-104.

Cross references. — Private ways, Ga. Const. 1983, Art. I, Sec. III, Para. II. Specific powers of General Assembly, Ga. Const. 1983, Art. III, Sec. VI, Para. II.

Law reviews. — For comment on DeKalb County v. Trustees, Decatur Lodge No. 1602, 242 Ga. 707, 251 S.E.2d 243 (1978), see 31 Mercer L. Rev. 367 (1979).

JUDICIAL DECISIONS

Eminent domain statutes must be strictly construed. — The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression. Thomas v. City of Cairo, 206 Ga. 336, 57 S.E.2d 192 (1950).

Private property cannot be taken for public uses, except under the forms and by due course of law. Thomas v. City of Cairo, 206 Ga. 336, 57 S.E.2d 192 (1950).

Owner entitled to compensation as of date of taking. — When private property is condemned for public use the owner is entitled to receive just and adequate compensation as of the date of the taking and not as of the date of the announcement of the taking, and the value of the property should be fixed at the time of its taking. R.E. Adams Properties, Inc. v. City of Gainesville, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Compensation must be paid before property is taken. — In eminent domain proceedings, the property owner must be paid just and adequate compensation before the owner's property is taken. Thomas v. City of Cairo, 206 Ga. 336, 57 S.E.2d 192 (1950).

Payment of just and adequate compensation to the owner must always precede the taking of property for public use. City of Atlanta v. Wright, 159 Ga. App. 809, 285 S.E.2d 250 (1981).

Taking includes interference with rights incident to property. — A taking of property for which compensation must be first paid does not require an actual physical taking, but may consist in an interference with the rights of ownership,

use and enjoyment, or any other right incident to property. Woodside v. City of Atlanta, 214 Ga. 75, 103 S.E.2d 108 (1958).

In a condemnation case, an arbitrator properly found that the condemnor who refused to assist the owner of the condemned land in relocating its plant located on the condemned land, was responsible for the owner's failure to relocate the plant. Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 617 S.E.2d 612 (2005).

Because the cost of relocating a plant located on the condemned land exceeded the plant's value, as awarded by an arbitrator, the plant's owner could not be charged with failing to mitigate its damages by not relocating. Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 617 S.E.2d 612 (2005).

Remote and speculative or possible damages are not allowed. McCrea v. Georgia Power Co., 46 Ga. App. 276, 167 S.E. 540 (1933).

Market value is not the only criterion for determining just and adequate compensation when property is taken or damaged for public purposes. State Hwy. Dep't v. Augusta Dist. of N. Ga. Conference of Methodist Church, 115 Ga. App. 162, 154 S.E.2d 29 (1967).

There are three recognized techniques for determining market value: replacement cost new less depreciation, income, and comparable sales. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Loss of future revenue is not a proper measure of damages in condemnation procedures, but the value of property to the owner for the particular purpose for which the owner designs to use the property can always be shown. Harrison v. Regents of Univ. Sys., 105 Ga. App. 817, 125 S.E.2d 793 (1962).

Attorneys' fees need not be included in measuring just compensation under the Georgia Constitution. Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980), cert. denied, 450 U.S. 936, 101 S. Ct. 1403, 67 L. Ed. 2d 372 (1981).

"Unique" property. — Since valuing property at its fair market value presupposes a willing buyer and a willing seller, properties are "unique" when fair market value will not afford just and adequate compensation when the properties are not of a type generally bought or sold in the open market. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Whether or not property is unique is a jury question. Dixie Hwy. Bottle Shop, Inc. v. Department of Transp., 150 Ga. App. 839, 258 S.E.2d 646 (1979); DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

Valuation of "unique" property. — "Unique" property is measured by a variety of nonfair market methods of valuation, including the cost and income methods. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

It is not incorrect to instruct jury on lost profits as a means of awarding just and adequate compensation because the income approach necessarily takes into account what future earnings would be were the property interest not extinguished. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Recovery of business losses. — Business losses are recoverable as a separate item only if the property is "unique." DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

When a business belongs to the landowner, total destruction of the business at the location must be proven before business losses may be recovered as a separate element of compensation. DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

When the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land whether the destruction of the business is total or merely partial, provided only that the loss is not remote or speculative. DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

In a condemnation case, the fact that the owner of the condemned land had ceased the operation of a rendering plant located on the land by the time of trial did not preclude the recovery of business loss damages. Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 617 S.E.2d 612 (2005).

Award of business loss damages was proper for the condemnation of land on which a rendering plant was located because the loss was not speculative: the plant was established and plants engaged in the rendering business were not generally bought and sold on the open market, making it unique. Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 617 S.E.2d 612 (2005).

Application of law existing on date of appeal to case already tried. — Owners in condemnation cases have vested rights to just and adequate compensation which cannot be destroyed by applying the law existing as of the date of the appeal to a case that has already been tried. Dot v. Worley, 150 Ga. App. 768, 258 S.E.2d 436, aff'd and modified on other grounds, 244 Ga. 783, 263 S.E.2d 436 (1979).

Limitations on action for interference with right of access. — The property owner whose right of access is damaged by public improvements to the streets either by obstructing or cutting off completely access or travel in a particular direction may maintain an action only when the interference is at or within the first intersecting block from the owner's property. Decatur County v. Settles, 107 Ga. App. 150, 129 S.E.2d 212 (1962).

The Department of Transportation is not required to condemn or pay for, as a separate and additional item of damage, the taking of a nonexistent property right, the "right of access" to a limited-access highway, except where an old highway is included therein. State Hwy. Dep't v. Kinsey, 131 Ga. App. 770, 206 S.E.2d 835 (1974).

Insufficient compliance with O.C.G.A. § 22-1-9. — In a condemnation action, the court vacated the trial court's order adopting the special master's return as to the property value because none of the city's offers prior to 2014 satisfied the dictates of O.C.G.A. § 22-1-9(3) and the city took several years to comply with § 22-1-9(3), which bore on the issue of whether the city acted in bad faith, which required further consideration by the trial court. Summerour v. City of Marietta, 338 Ga. App. 259, 788 S.E.2d 921 (2016), aff'd in part and rev'd in part, 302 Ga. 645, 807 S.E.2d 324 (2017).

Cessation of work on project after notifying property owner of possible condemnation. — After the Department of Transportation informed a corporation in the spring of 1981 that a building leased by the corporation would be condemned for highway purposes, but later all work on the proposed highway, including all condemnation actions in progress, was halted, and the corporation sought to recover from the department the corporation's loss of an advantageous leasehold interest, as well as expenses involved in moving, since the corporation had been advised that no move was required before September 1982, and that written notification would precede a required removal, the corporation's decision to move in August 1982, was by voluntary choice, and could not be attributed to an interference by the department with the corporation's exclusive rights of ownership, use and enjoyment. Hence, whether the corporation's action was characterized as direct or inverse condemnation, the losses claimed did not result from an exercise of eminent domain. Josh Cabaret, Inc. v. DOT, 256 Ga. 749, 353 S.E.2d 346 (1987).

Cited in Housing Auth. v. Savannah Iron & Wire Works, Inc., 90 Ga. App. 150, 82 S.E.2d 244 (1954); DOT v. Glenn, 243 Ga. 21, 252 S.E.2d 906 (1979); Simmons v. DOT, 225 Ga. App. 572, 484 S.E.2d 332 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Owner's recovery not restricted to market value. — The constitutional and statutory provisions as to just and adequate compensation do not necessarily restrict the owner's recovery to market value; the owner is entitled to the value of the property to the owner, not the property's value to the state. 1958-59 Op. Att'y Gen. p. 271.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 112 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 90 et seq.

C.J.S. — 25 C.J.S., Damages, § 1 et seq. 29A C.J.S., Eminent Domain, § 66 et seq.

ALR. — Right to and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway, 19 A.L.R. 383.

Right of abutting owner to compensation for railroad in street under constitutional provision against damaging property for public use without compensation, 22 A.L.R. 145.

Limitation applicable to action for consequential damage as result of taking or damaging of property for public use, 30 A.L.R. 1190; 139 A.L.R. 1288.

Right to interest in condemnation proceedings during owner's retention of possession, 32 A.L.R. 98.

Right to compensation for improvements made under authority, or color thereof, by body having power of eminent domain, before exercise of that power, 34 A.L.R. 1082.

Damage to property from proximity of cemetery as "damage" within constitutional provision against taking or damaging property without compensation, 36 A.L.R. 527.

Changing location of railroad or street railway in street or highway as a taking or damaging for which compensation must be made, 46 A.L.R. 1446.

Provision for taking or retaining possession pending appeal in condemnation proceeding, 55 A.L.R. 201.

Right of abutting owner to compensation on widening of highway space for vehicle traffic, 55 A.L.R. 896.

Liability of railroad company to property owner for change of grade incident to construction of overhead or underground crossing, 57 A.L.R. 657.

Lack of diligence to contest a public use on ground that compensation has not been made for private property or rights as affecting right to relief, 58 A.L.R. 681.

Are different estates or interests in real property taken under eminent domain to be valued separately, or is entire property to be valued as a unit and the amount apportioned among separate interests, 69 A.L.R. 1263; 166 A.L.R. 1211.

Right of tenant to remove buildings or other fixtures as affecting tenant's right to compensation in respect to such improvements in condemnation proceeding, 75 A.L.R. 1495.

Power to condemn, or authorize the condemnation of, capital stock of a public utility, 81 A.L.R. 1071.

Measure and items of compensation or damages for flooding property under the right of eminent domain, 106 A.L.R. 955.

Compensation for property confiscated or requisitioned during war, 137 A.L.R. 1290; 147 A.L.R. 1297; 148 A.L.R. 1384; 149 A.L.R. 1451; 149 A.L.R. 1452; 150 A.L.R. 1417; 150 A.L.R. 1418; 151 A.L.R. 1453; 152 A.L.R. 1450; 154 A.L.R. 1447.

Extraterritorial effect of confiscation of property and nationalization of corporations, 139 A.L.R. 1209.

Rights of mortgagee in award in eminent domain proceedings, 154 A.L.R. 1110.

Measure of compensation in eminent domain to be paid to state or municipality for taking of public highway or street, 160 A.L.R. 955.

General governmental policy (distinguished from specific project) as affecting compensation allowable in eminent domain, 167 A.L.R. 502.

Damage to private property caused by negligence of governmental agents as "taking," "damage," or "use" for public purposes, in constitutional sense, 2 A.L.R.2d 677.

Elements and measure of compensation in eminent domain for temporary use and occupancy, 7 A.L.R.2d 1297.

Constitutional rights of owner as against destruction of building by public authorities, 14 A.L.R.2d 73.

Validity, construction, and effect of provisions in life or accident policy in relation to military service, 36 A.L.R.2d 1018.

Eminent domain: elements and measure of compensation for oil or gas pipeline through private property, 38 A.L.R.2d 788; 23 A.L.R.4th 631.

Municipal power to condemn land for cemetery, 54 A.L.R.2d 1322.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 A.L.R.2d 1453.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating to damages or the value of the property condemned, 80 A.L.R.2d 1270.

Valuation at time of original wrongful entry by condemnor or at time of subsequent initiation of condemnation proceedings, 2 A.L.R.3d 1038.

Eminent domain: restrictive covenant or right to enforcement thereof as compensable property right, 4 A.L.R.3d 1137.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 A.L.R.3d 901.

Substitute condemnation: power to condemn property or interest therein to replace other property taken for public use, 20 A.L.R.3d 862.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land on issue of value in eminent domain proceedings, 26 A.L.R.3d 780.

Rights and liabilities of parties to executory contract for sale of land taken by eminent domain, 27 A.L.R.3d 572.

Award of, or pending proceedings for, compensation for property condemned, as precluding action for damages arising from prior trespasses upon it, 33 A.L.R.3d 1132.

Eminent domain: cost of substitute facilities as measure of compensation paid to state or municipality for condemnation of public property, 40 A.L.R.3d 143.

Abutting owner's right to damages for limitation of access caused by conversion of conventional road into limited-access highway, 42 A.L.R.3d 13.

Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway, 42 A.L.R.3d 148.

Measure of damages for condemnation of cemetery lands, 42 A.L.R.3d 1314.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 A.L.R.3d 860.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 A.L.R.3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 A.L.R.3d 581.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 A.L.R.3d 488.

Eminent domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 A.L.R.3d 534.

Eminent domain: condemnor's liability for costs of condemnee's expert witnesses, 68 A.L.R.3d 546.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 A.L.R.3d 1122.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 A.L.R.3d 456.

Good will as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

Compensation for interest prepayment penalty in eminent domain proceeding, 84 A.L.R.3d 946.

Necessity of trial or proceeding separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award, 94 A.L.R.3d 696.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 A.L.R.3d 752.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 A.L.R.3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Eminent domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold, 17 A.L.R.4th 337.

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 A.L.R.4th 765.

Eminent domain: compensability of loss of view from owner's property—state cases, 25 A.L.R.4th 671.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 A.L.R.4th 68.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

Measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable or noncommercial use, 29 A.L.R.5th 36.

Elements and measure of compensation in eminent domain proceeding for temporary taking of property, 49 A.L.R.6th 205.

Admissibility of hospital records under Federal Business Records Act (28 USC sec. 1732(a)), 9 A.L.R. Fed. 457.

22-1-6. Right of persons to take or damage private property upon payment of just and adequate compensation.

If a person who is authorized to exercise the power of eminent domain cannot by contract procure the property or the easement, right of way, waterway, franchise, or other interest sought to be condemned, the person may take or damage the property or interest upon paying or tendering to the owner thereof just and adequate compensation.

History. — Ga. L. 1894, p. 95, § 2; Civil Code 1895, § 4658; Civil Code 1910, § 5207; Code 1933, § 36-302.

Law reviews. — For annual survey of real property law, see 68 Mercer L. Rev. 231 (2016).

JUDICIAL DECISIONS

Eminent domain statutes must be strictly construed. — The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression. Thomas v. City of Cairo, 206 Ga. 336, 57 S.E.2d 192 (1950).

Private property cannot be taken for public uses, except under the forms and by due course of law. Thomas v. City of Cairo, 206 Ga. 336, 57 S.E.2d 192 (1950).

Appropriation of land without condemnation proceedings renders one a trespasser. Postal Telegraph-Cable Co. v. Kuhnen, 127 Ga. 20, 55 S.E. 967 (1906).

Term "right of way" was limited by former Civil Code 1910, § 5233 (see O.C.G.A. § 22-2-85) and did not imply the grant of the fee, so as to prevent the county from constructing a highway thereon. Atlanta B. & Atl. Ry. v. County of Coffee, 152 Ga. 432, 110 S.E. 214 (1921).

What direct and consequential damages are recoverable. — Damages, both direct and consequential, which are recoverable are those arising from construction from some visible and physical inference with a specific piece of property, or with some specific right or rise connected therewith and capable of exact description. Austin v. Augusta Term. Ry., 108 Ga. 671, 34 S.E. 852, 47 L.R.A. 755 (1899).

Measure of damage is value of land

taken and consequential damage, if any, to the remainder of the land. State Hwy. Dep't v. Weldon, 107 Ga. App. 98, 129 S.E.2d 396 (1962).

Condemnor has burden of proving what is just and adequate compensation for the property taken. Georgia Power Co. v. Smith, 94 Ga. App. 166, 94 S.E.2d 48 (1956).

Insufficient compliance with O.C.G.A. § 22-1-9. — In a condemnation action, the court vacated the trial court's order adopting the special master's return as to the property value because none of the city's offers prior to 2014 satisfied the dictates of O.C.G.A. § 22-1-9(3) and the city took several years to comply with § 22-1-9(3), which bore on the issue of whether the city acted in bad faith, which required further consideration by the trial court. Summerour v. City of Marietta, 338 Ga. App. 259, 788 S.E.2d 921 (2016), aff'd in part and rev'd in part, 302 Ga. 645, 807 S.E.2d 324 (2017).

Burden to show consequential damage. — The condemnor has the burden of proving whether there has been consequential damage to the remaining property and, if so, how much. Georgia Power Co. v. Smith, 94 Ga. App. 166, 94 S.E.2d 48 (1956).

Consequential damages include interference with the right of ingress and egress resulting from construction of public works. Mallory v. Morgan County, 131 Ga. 271, 62 S.E. 179 (1908).

Consequential damages to remaining property to be determined in separate suit. — The damages to the remainder of the property caused by negligence or trespass in the construction process may not be considered in a condemnation proceeding but must be determined in a separate lawsuit. DeKalb County v. Cowan, 151 Ga. App. 753, 261 S.E.2d 478 (1979).

Market value is true measure of compensation. — When property is taken under power of eminent domain for a public use, the property's market value for all purposes for which the property is available is the true measure of the owner's compensation. Georgia Power Co. v. Smith, 94 Ga. App. 166, 94 S.E.2d 48 (1956).

Sales of similar property as evidence of value. — On a question in regard to the value of land sought to be condemned, it is competent to introduce evidence of sales of property similar to that in question, made at or near the time of the taking. The exact limit either of similarity or difference or of nearness or remoteness in point of time is difficult, if not impossible, to prescribe by any arbitrary rule, but must to a large extent depend on the location and the character of the property and the circumstances of the case; it is to be considered with reference to throwing light on the issue, and not as a mere method of raising a legal puzzle. West v. Fulton County, 95 Ga. App. 320, 97 S.E.2d 785 (1957).

Present and prospective value of condemned land as bridge site may be considered in determining damages. Mitchell County v. Hudspeth, 151 Ga. 767, 108 S.E. 305 (1921).

Correct measure of damage to one holding leasehold interest in land for over five years is the diminution in the market value of the premises for rent for the remainder of the term of the lease, that is, from the time of the damage till the end of the lease. Jones v. Richmond County, 61 Ga. App. 857, 7 S.E.2d 754 (1940).

Failure to secure property by contract is prerequisite to condemnation. — Failure to secure the property by contract, by reason of the inability of the parties to agree upon the compensation to be paid therefor, is an essential prerequisite to the condemnation of private property for public uses. City of Elberton v. Hobbs, 121 Ga. 750, 49 S.E. 780 (1905).

Negotiations by a county authority, procuring right of way for roads in the name of the Department of Transportation (formerly State Highway Department) in an effort to agree with the owner of the property to be taken are not only authorized, but are required. Miller v. State Hwy. Dep't, 200 Ga. 485, 37 S.E.2d 365 (1946).

Former Code 1933, §§ 36-302 and 36-303 (see O.C.G.A. §§ 22-1-6 and 22-1-7) required negotiation between the condemnor and condemnee and a failure to agree before condemnation proceedings could be instituted. Cable v. State Hwy. Bd., 208 Ga. 593, 68 S.E.2d 564 (1952).

Trial court did not err in denying the property owners' motion to dismiss the condemnation petition, nor in overruling the owners' exception to the special master's award, because the evidence at the special master hearing showed that the telecommunications condemnor made an effort to agree on a purchase price for the property, but that those negotiations ultimately failed, which was sufficient to show that the condemnor could not procure the property by contract within the meaning of O.C.G.A. § 22-1-6. White v. Ringgold Tel. Co., 334 Ga. App. 325, 779 S.E.2d 378 (2015), cert. denied, No. S16C0404, 2016 Ga. LEXIS 148 (Ga. 2016).

Condemnor must show that proper effort was made to procure land by contract from the owner prior to institution of the condemnation proceedings. St. Clair v. State Hwy. Bd., 45 Ga. App. 488, 165 S.E. 297 (1932).

Failure to contract may be raised as objection on appeal. — An objection by a landowner filed on appeal from an award by assessors that there was no effort to contract with the landowner will be heard. Atlanta Terra Cotta Co. v. Georgia Ry. & Elec. Co., 132 Ga. 537, 64 S.E. 563 (1909).

Tender and refusal by owner of the fair value of property is sufficient negotiation. Bridwell v. Gate City Term. Co., 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907).

Letter addressed to an executor personally, and not in the executor's representative capacity will not authorize a city to condemn the property. City of Atlanta v. Austell, 146 Ga. 456, 91 S.E. 478 (1917).

Railroads may contract for property necessary to their operation. Atlanta B. & Atl. Ry. v. County of Coffee, 152 Ga. 432, 110 S.E. 214 (1921).

If landowner permits, without legal objection, public utility to appropriate the owner's land to its necessary corporate use until such becomes a necessary and constituent part of its service to the public, the landowner, not for the protection so much of the company but for the benefit of the public, will be estopped from recovering the land in ejectment or from enjoining its use for the service, but will, if the owner moves in time, be remitted to an appropriate action for damages. Georgia Power Co. v. Kelly, 182 Ga. 33, 184 S.E. 861 (1936).

Ordinance allowing city to refuse property and payment held invalid. — City ordinance which provides for the condemnation of property, with the proviso that the city might refuse to accept the property or to pay the award of the assessors if the amount, manner of payment, and terms thereof were not satisfactory to the city, is invalid and the city would be enjoined from proceeding thereunder. Thomas v. City of Cairo, 206 Ga. 336, 57 S.E.2d 192 (1950).

Cited in Western Union Tel. Co. v. Western & A.R.R., 142 Ga. 532, 83 S.E. 135 (1914); Hoch v. Candler, 190 Ga. 390, 9 S.E.2d 622 (1940); United States v. A Certain Tract or Parcel of Land, 44 F. Supp. 712 (S.D. Ga. 1942); State Hwy. Dep't v. Whitehurst, 106 Ga. App. 532, 127 S.E.2d 501 (1962); State Hwy. Dep't v. Hilliard, 112 Ga. App. 498, 145 S.E.2d 824 (1965); Multitex Corp. of Am. v. Dickinson, 683 F.2d 1325 (11th Cir. 1982).

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Damages measured by fair market value of property. — Ordinarily, when an entire parcel of property is taken, or an entire leasehold interest is taken, the measure of the damages is the "market value" of the land or leasehold interest as the case might be; market value has been defined as the price which may be paid by one wishing but not required to buy, to one wishing but not required to sell. 1958-59 Op. Att'y Gen. p. 271.

Owner's recovery not restricted to market value. — The constitutional and statutory provisions as to just and adequate compensation do not necessarily restrict the owner's recovery to market value; the owner is entitled to the value of the property to the owner, not the property's value to the state. 1958-59 Op. Att'y Gen. p. 271.

Fair and reasonable value of property as measure of damages. — The

measure of damages for property taken by the right of eminent domain, being compensatory in its nature, is the pecuniary loss sustained by the owner, taking into consideration all relevant factors; this loss may be represented by the fair and reasonable value of the property taken if the market value would not coincide with the actual value thereof. 1958-59 Op. Att'y Gen. p. 271.

Costs of removing personal or business property from real estate. — The cost of moving personal property from real estate which is taken for public purposes cannot be considered as an element of damage, as such; however, the cost of removal of either fixtures, buildings, or personalty, especially when used for business purposes, may be considered as one of the factors entering into a determination of the value of the real estate to the condemnee from whom it is taken. 1958-59 Op. Att'y Gen. p. 271.

Reimbursement of utility companies relocated due to interstate highway construction. — Utility companies whose facilities must be relocated or reconstructed by reason of the construction of any segment of the Interstate Highway System must be reimbursed therefor. 1958-59 Op. Att'y Gen. p. 184.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 112 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 90 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 57 et seq., 66 et seq.

ALR. — Expense of building and maintaining fences as element in the determination of damages in eminent domain, 10 A.L.R. 451.

Compensation in second eminent domain proceeding, 18 A.L.R. 569.

Right under constitutional provision against taking or damaging, to recover in other than an eminent domain proceeding, for consequential damages to property no part of which is taken, 20 A.L.R. 516.

Changing location of railroad or street railway in street or highway as a taking or damaging for which compensation must be made, 46 A.L.R. 1446.

Damages in eminent domain as affected by actual or potential value of riparian rights in connection with other property, 58 A.L.R. 796.

Measure of damages or compensation where property is taken to widen street, 64 A.L.R. 1513.

Are different estates or interests in real property taken under eminent domain to be valued separately, or is entire property to be valued as a unit and the amount apportioned among separate interests, 69 A.L.R. 1263; 166 A.L.R. 1211.

Conveyance as passing right to proceeds of condemnation proceedings pending at time of conveyance, 82 A.L.R. 1063.

Measure and items of compensation or damages for flooding property under the right of eminent domain, 106 A.L.R. 955.

Right of owner or occupant of property to damages, and measure and elements thereof, because of temporary closing or obstruction during repairs or reconstruction of street or highway, under statutes in the regard, 120 A.L.R. 896.

Elements and measure of compensation for power lines or other wire lines over private property, 124 A.L.R. 407.

Distinction between income or profits from business on land and income or profits from use of land, as affecting admissibility of evidence in that regard on question of damages in eminent domain, 134 A.L.R. 1125.

Rights in respect of proceeds of an award in eminent domain proceedings made after mortgage foreclosure sale, 170 A.L.R. 272.

Damage to private property caused by negligence of governmental agents as "taking," "damage," or "use" for public purposes, in constitutional sense, 2 A.L.R.2d 677.

Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property, 6 A.L.R.2d 1197.

Compensation for, or extent of rights acquired by, taking of land, as affected by

condemner's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Elements and measure of compensation in eminent domain for temporary use and occupancy, 7 A.L.R.2d 1297.

Eminent domain: elements and measure of compensation for oil or gas pipeline through private property, 38 A.L.R.2d 788.

Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street, 43 A.L.R.2d 1072; 42 A.L.R.3d 13; 42 A.L.R.3d 148.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street, 64 A.L.R.2d 866.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 A.L.R.2d 1453.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating to damages or the value of the property condemned, 80 A.L.R.2d 1270.

Rights in condemnation award where land taken was subject to possible rights of reverter or reentry, 81 A.L.R.2d 568.

Right to damages or compensation upon condemnation of property, of holder of unexercised option to purchase, 85 A.L.R.2d 588.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 A.L.R.2d 772.

Valuation at time of original wrongful entry by condemnor or at time of subsequent initiation of condemnation proceedings, 2 A.L.R.3d 1038.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 A.L.R.3d 901.

Substitute condemnation: power to condemn property or interest therein to replace other property taken for public use, 20 A.L.R.3d 862.

Rights and liabilities of parties to executory contract for sale of land taken by eminent domain, 27 A.L.R.3d 572.

Award of, or pending proceedings for, compensation for property condemned, as precluding action for damages arising from prior trespasses upon it, 33 A.L.R.3d 1132.

Eminent domain: cost of substitute facilities as measure of compensation paid to state or municipality for condemnation of public property, 40 A.L.R.3d 143.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 A.L.R.3d 860.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 A.L.R.3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 A.L.R.3d 581.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 A.L.R.3d 1122.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 A.L.R.3d 456.

Good will as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

Compensation for interest prepayment penalty in eminent domain proceedings, 84 A.L.R.3d 946.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 A.L.R.3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 A.L.R.4th 765.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23 A.L.R.4th 631.

State statute of limitations applicable to inverse condemnation or similar pro-

ceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 A.L.R.4th 68.

Solar energy: landowner's rights against interference with sunlight desired for purposes of solar energy, 29 A.L.R.4th 349.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

Admissibility of hospital records under Federal Business Records Act (28 USC sec. 1732(a)), 9 A.L.R. Fed. 457.

22-1-7. Effect of failure to agree on compensation.

If the parties cannot agree upon the compensation to be paid, the same shall be assessed and determined as provided in Article 1 of Chapter 2 of this title.

History. — Ga. L. 1894, p. 95, § 3; Civil Code 1895, § 4659; Civil Code 1910, § 5208; Code 1933, § 36-303.

JUDICIAL DECISIONS

Eminent domain statutes must be strictly construed. — The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression. Thomas v. City of Cairo, 206 Ga. 336, 57 S.E.2d 192 (1950).

Private property cannot be taken for public uses, except under the forms and by due course of law. Thomas v. City of Cairo, 206 Ga. 336, 57 S.E.2d 192 (1950).

Sole question to be passed upon is amount of compensation. — In a proceeding under this section, the sole question to be passed upon by the assessors, or a jury in the superior court on appeal, is the amount of compensation to be paid. Atlantic & B.R.R. v. Penny, 119 Ga. 479, 46 S.E. 665 (1904).

Compensation must be paid before property is taken. — In eminent domain proceedings, the property owner must be paid just and adequate compensation before the owner's property is taken. Thomas v. City of Cairo, 206 Ga. 336, 57 S.E.2d 192 (1950).

Negotiations with property owner required. — Negotiations by a county authority, procuring right of way for roads in the name of the Department of Transportation (formerly State Highway Department) in an effort to agree with the owner of the property to be taken are not only authorized, but are required. Miller v. State Hwy. Dep't, 200 Ga. 485, 37 S.E.2d 365 (1946).

Former Code 1933, §§ 36-302 and 36-303 (see O.C.G.A. §§ 22-1-6 and 22-1-7) required negotiation between the condemnor and condemnee and a failure to agree before condemnation proceedings could be instituted. Cable v. State Hwy. Bd., 208 Ga. 593, 68 S.E.2d 564 (1952).

Cited in Barber v. Housing Auth., 189 Ga. 155, 5 S.E.2d 425 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 112 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Prac-

tice Forms, Eminent Domain, § 90 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 66 et seq, 206 et seq.

ALR. — Eminent domain: elements and measure of compensation for oil or gas pipeline through private property, 38 A.L.R.2d 788; 23 A.L.R.4th 631.

Mandamus to compel ascertainment of compensation for property taken or for injuries inflicted under the power of eminent domain, 91 A.L.R.2d 991.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 A.L.R.3d 456.

Good will as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 A.L.R.4th 765.

Admissibility of hospital records under Federal Business Records Act (28 USC sec. 1732(a)), 9 A.L.R. Fed. 457.

22-1-8. Exclusive nature of title.

All persons authorized to take or damage private property for public purposes shall proceed as set forth in this title.

History. — Ga. L. 1894, p. 95, § 1; Civil Code 1895, § 4657; Civil Code 1910, § 5206; Code 1933, § 36-301.

JUDICIAL DECISIONS

Second application for condemnation. — When an application for condemnation is filed, and no steps are taken thereunder and it is abandoned, a new application may be made without reference to the abandoned application. Hutchinson v. Copeland, 146 Ga. 357, 91 S.E. 206 (1917).

Injunction against condemnation. — The court grants an injunction against condemnation when it is shown that the plaintiff made a bona fide selection of the right of way sought to be condemned. Western & Atl. R.R. v. Western Union Tel. Co., 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912); Nashville, C. & S.L. Ry. v. Western Union Tel. Co., 142 Ga. 525, 83 S.E. 123 (1914).

Appropriation or damage for public purposes. — It is only when property has been appropriated or damaged by the erection and maintenance of a public improvement that the owner can recover upon the theory that the owner's property has been appropriated or damaged for public purposes. Rhines v. Commissioners of Chatham County, 50 Ga. App. 844, 179 S.E. 140 (1935).

Law prescribing condemnation procedure incorporated by implication in municipal charter. — When the city charter declared that city would have full power and authority to condemn property for the purpose of opening new streets to be exercised in the manner provided in former Code 1933, §§ 36-301, 36-502, and 36-503 (see O.C.G.A. §§ 22-1-8 and 22-2-61) which taken alone did not provide a method, the general law of the state prescribing the procedure and the method of ascertaining damages became by implication a part of the municipal charter. Glidden Co. v. City of Collins, 189 Ga. 656, 7 S.E.2d 266 (1940).

Cited in Fleming v. City of Rome, 130 Ga. 383, 61 S.E. 5 (1908); Western & Atl. R.R. v. Western Union Tel. Co., 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912); Willcox v. State Hwy. Bd., 38 Ga. App. 373, 144 S.E. 214 (1928); Central of Ga. Ry. v. Thomas, 167 Ga. 110, 144 S.E. 739 (1928); H.G. Hastings Co. v. Southern Natural Gas Corp., 173 Ga. 212, 159 S.E. 853 (1931); State Hwy. Bd. v. Shierling, 51 Ga. App. 935, 181 S.E. 885 (1935); Harrison v. State Hwy. Dep't, 183 Ga. 290, 188 S.E. 445 (1936); State Hwy. Bd. v. Long, 61 Ga. App. 173, 6 S.E.2d 130 (1939); Hoch v. Candler, 190 Ga. 390, 9 S.E.2d 622 (1940);

United States v. A Certain Tract or Parcel of Land, 44 F. Supp. 712 (S.D. Ga. 1942); Marist Soc'y v. City of Atlanta, 212 Ga. 115, 90 S.E.2d 564 (1955); Combs v. State Hwy. Dep't, 111 Ga. App. 132, 140 S.E.2d 892 (1965); DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

RESEARCH REFERENCES

C.J.S. — 25 C.J.S., Damages, § 1 et seq.

22-1-9. Policies and practices guiding exercise of eminent domain.

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for property owners, and to promote public confidence in land acquisition practices, all condemnations and potential condemnations shall, to the greatest extent practicable, be guided by the following policies and practices:

(1) The condemning authority shall make every reasonable effort to acquire expeditiously real property by negotiation;

(2) Where the condemning authority seeks to obtain a fee simple interest in real property, real property shall be appraised before the initiation of negotiations, and the owner or his or her designated representatives shall be given an opportunity to accompany the appraiser during his or her inspection of the property, except that the condemning authority may, by law, rule, regulation, or ordinance, prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value;

(3) Before the initiation of negotiations for fee simple interest for real property, the condemning authority shall establish an amount which it believes to be just compensation and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the condemning authority's independent appraisal of the fair market value of such property. The condemning authority shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated. The condemning authority shall consider alternative sites suggested by the owner of the property as part of the compensation offered;

(4) No owner shall be required to surrender possession of real property before the condemning authority pays the agreed purchase

price or deposits with the court in accordance with this title, for the benefit of the owner, an amount not less than the condemning authority's appraisal of the fair market value of such property or the amount of the award of compensation in the condemnation proceeding for such property;

(5) The construction or development of a project for public use shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling or to move his or her business or farm operation without at least 90 days' written notice from the condemning authority of the date by which such move is required;

(6) If the condemning authority permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the condemning authority on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier;

(7) In no event shall the condemnor act in bad faith in order to compel an agreement on the price to be paid for the property;

(8) If any legal interest in real property is to be acquired by exercise of the power of eminent domain, the condemning authority shall institute formal condemnation proceedings. No condemnor shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his or her real property; and

(9) A person whose real property is being acquired in accordance with this title may, after the person has been fully informed of his or her right to receive just compensation for such property, donate such property, any part thereof, any legal interest therein, or any compensation paid to a condemning authority, as such person shall determine.

History. — Code 1981, § 22-1-9, enacted by Ga. L. 2006, p. 39, § 5/HB 1313; Ga. L. 2013, p. 141, § 22/HB 79; Ga. L. 2018, p. 1112, § 22/SB 365.

The 2018 amendment, effective May 8, 2018, part of an Act to revise, modernize, and correct the Code, substituted "property as part of the compensation offered" for "property as of the compensation offered" at the end of the last sentence in paragraph (3).

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U. L. Rev. 157 (2006). For annual survey on real property, see 69 Mercer L. Rev. 251 (2017). For annual survey on real property law, see 70 Mercer L. Rev. 209 (2018).

JUDICIAL DECISIONS

Sufficient compliance with O.C.G.A. § 22-1-6 shown. — Trial court did not err in denying the property owners' motion to dismiss the condemnation petition, nor in overruling the owners' exception to the special master's award, because the evidence at the special master hearing showed that the telecommunications condemnor made an effort to agree on a purchase price for the property, but that those negotiations ultimately failed, which was sufficient to show that the condemnor could not procure the property by contract within the meaning of O.C.G.A. § 22-1-6. White v. Ringgold Tel. Co., 334 Ga. App. 325, 779 S.E.2d 378 (2015), cert. denied, No. S16C0404, 2016 Ga. LEXIS 148 (Ga. 2016).

Public necessity established. — Record was sufficient to sustain the county's decision to condemn the buffer zone because a public use was established as the county set forth the county's method of isolating methane-contaminated land to county-owned property based on the county's expert testifying that acquiring the buffer zone would eliminate any reasonable probability that methane would migrate onto property owned by the property owner. Morgan County v. Gay, 352 Ga. App. 555, 834 S.E.2d 576 (2019), cert. denied, No. S20C0331, 2020 Ga. LEXIS 380 (Ga. 2020); cert. denied, No. S20C0495, 2020 Ga. LEXIS 390 (Ga. 2020); cert. denied, No. S20C0332, 2020 Ga. LEXIS 398 (Ga. 2020).

Compliance with O.C.G.A. § 22-1-9. — Summary envisioned by O.C.G.A. § 22-1-9(3) requires, at a minimum, information sufficient, as part of the prompt offer, required prior to the initiation of the negotiations, to provide the property owner with the ability to meaningfully evaluate the offer; simply informing the property owner that the property has been appraised and that the amount offered is the appraised amount, while certainly concise, fails to convey the sum and substance of the basis of the offer. Summerour v. City of Marietta, 338 Ga. App. 259, 788 S.E.2d 921 (2016), aff'd in part and rev'd in part, 302 Ga. 645, 807 S.E.2d 324 (2017).

Insufficient compliance with O.C.G.A. § 22-1-9. — In a condemnation action, the court vacated the trial court's order adopting the special master's return as to the property value because none of the city's offers prior to 2014 satisfied the dictates of O.C.G.A. § 22-1-9(3) and the city took several years to comply with § 22-1-9(3), which bore on the issue of whether the city acted in bad faith, which required further consideration by the trial court. Summerour v. City of Marietta, 338 Ga. App. 259, 788 S.E.2d 921 (2016), aff'd in part and rev'd in part, 302 Ga. 645, 807 S.E.2d 324 (2017).

City seeking to acquire a landowner's property violated O.C.G.A. § 22-1-9(3) because the city failed to disclose the appraisal summary to the owner in a timely manner as required by the statute, instead sending the summary ten months after the summary was requested by the owner; the statute was mandatory, and dismissal of the condemnation petition was the proper remedy. City of Marietta v. Summerour, 302 Ga. 645, 807 S.E.2d 324 (2017).

Public necessity established for condemnation. — Record supported that the condemnation of the buffer property would serve a public purpose and that the county did not act in bad faith because failing to disclose the extent of methane migration provided no financial benefit for the county since at no time did the county discount the price the county was offering the property owner for the buffer property due to ignorance of the status of methane migration. Morgan County v. Gay, 352 Ga. App. 555, 834 S.E.2d 576 (2019), cert. denied, No. S20C0331, 2020 Ga. LEXIS 380 (Ga. 2020); cert. denied, No. S20C0495, 2020 Ga. LEXIS 390 (Ga. 2020); cert. denied, No. S20C0332, 2020 Ga. LEXIS 398 (Ga. 2020).

County reset statutory compliance time period. — Trial court did not err by refusing to dismiss the condemnation petition and not awarding attorney fees to the property owner because while the county violated statutory procedure by failing to obtain an appraisal report prior

to initiating negotiations, the discussions had ceased and the county reset the county's opportunity to statutorily comply by obtaining an appraisal and promptly providing the appraisal to the property owner along with an offer to purchase the property at the appraised amount. Morgan County v. Gay, 352 Ga. App. 555, 834 S.E.2d 576 (2019), cert. denied, No. S20C0331, 2020 Ga. LEXIS 380 (Ga. 2020); cert. denied, No. S20C0495, 2020 Ga. LEXIS 390 (Ga. 2020); cert. denied, No. S20C0332, 2020 Ga. LEXIS 398 (Ga. 2020).

22-1-10. Duties of condemnor prior to exercise of eminent domain; rights of condemnee; exceptions.

(a) Prior to exercising the power of eminent domain, a governmental condemnor shall:

(1) Not less than 15 days before any meeting at which a resolution approving the exercise of eminent domain is to be considered, post a sign, if possible, in the right of way adjacent to each property that is subject to the proposed use of the eminent domain power stating the time, date, and place of such meeting;

(2) Attempt to serve the condemnee personally with notice of the meeting not less than 15 days before any meeting at which such resolution is to be considered, unless service is acknowledged or waived by the condemnee. If the attempted service is unsuccessful, service of notice may be satisfied by mail or statutory overnight delivery to the property owner at the address of record and, if different from the property owner, to the parties in possession of the property, return receipt requested;

(3) Ensure that any notice that is required by law to be published be placed in the county legal organ, but such notice shall not be published in the legal notices section of such newspaper; and

(4) Ensure that any meeting at which such resolution is to be considered and voted on shall commence after 6:00 P.M.

Any such resolution shall specifically and conspicuously delineate each parcel to be affected.

(b) A nongovernmental condemnor shall, with respect to its exercise of the power of eminent domain in general, by action of the governing body or chief executive officer of the condemnor designate who is authorized to approve the exercise of the power of eminent domain by the condemnor and provide a method for documenting the time of the exercise of final approval of a particular exercise of the power of eminent domain by that individual or group of individuals. Such a condemning authority shall with respect to any particular exercise of the power of eminent domain:

(1) Not less than 15 days before the documented time of approval of the exercise of eminent domain, post a sign, if possible, in the right

of way adjacent to each property that is subject to the proposed use of the eminent domain power stating: (A) that the property is subject to a proposed condemnation which may be initiated after 15 days from the date of posting; (B) the date of posting; and (C) the name, business address, and telephone number of the condemnor;

(2) Not less than 15 days before the documented time of approval of the exercise of eminent domain serve the condemnee personally with notice of the proposed condemnation stating: (A) that the property is subject to a proposed condemnation which may be initiated after 15 days from the date of service; (B) the date of service; and (C) the name, business address, and telephone number of the condemnor. If the attempted service is unsuccessful, service of notice may be satisfied by mail or statutory overnight delivery to the property owner at the address of record and, if different from the property owner, to the parties in possession of the property, return receipt requested; and

(3) Provide the condemnee with an opportunity to meet with the individual or group of individuals having the power of documented approval or a representative of such individual or individuals.

(c) The condemnee may in writing waive any rights of the condemnee under this Code section.

(d) Any notice required to be personally served or mailed under this Code section shall be accompanied by a written statement of the rights that the condemnee possesses including but not limited to the right to notice, damages, hearing, and appeal of any award entered by the special master as described in this title. The written statement of rights shall also include the right to bring a motion pursuant to Code Section 22-1-11 as well as a sample motion. The Department of Community Affairs shall promulgate written notice of rights forms that shall be used for purposes of this subsection. The Department of Community Affairs shall promulgate different notice forms for each of the types of condemnation proceedings authorized by law. This subsection shall not become effective until the Department of Community Affairs has promulgated the written notice of rights forms contemplated under this subsection and such forms shall be promulgated no later than January 1, 2007.

(e) This Code section shall not apply to condemnations for the purposes of constructing or expanding one or more electric transmission lines, to condemnations pursuant to Code Section 46-8-121, or to any condemnations under Title 32.

History. — Code 1981, § 22-1-10, enacted by Ga. L. 2006, p. 39, § 5/HB 1313.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landown-

er's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

JUDICIAL DECISIONS

Resolution valid. — Trial court did not err in authorizing a county to condemn a property owner's land, which was located in a city because the county was not required to show the city's consent as a precondition to condemnation, and the resolution, which authorized the use of eminent domain, referred to and incorporated an attachment to the resolution, an exhibit that specifically delineated each parcel that the county sought to condemn. Brunswick Landing, LLC v. Glynn County, 301 Ga. App. 288, 687 S.E.2d 271 (2009), cert. denied, No. S10C0558, 2010 Ga. LEXIS 246 (Ga. 2010).

Cited in City of Marietta v. Summerour, 302 Ga. 645, 807 S.E.2d 324 (2017).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 23 et seq., 30 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 22 et seq., 57 et seq., 250 et seq.

22-1-10.1. Time for bringing condemnation action; exceptions.

(a) Except as provided in subsections (b) and (c) of this Code section, no action for condemnation may be brought in any court of this state until at least 30 days after the date of the resolution or documented approval described in Code Section 22-1-10.

(b) If an emergency condition exists requiring the acquisition of property for the protection of the public health and safety, the condemnor may declare the existence of an emergency and adopt a resolution defining the emergency. Notice and hearing as required by Code Section 22-1-10 may be waived by the condemning body in an emergency condition.

(c) This Code section shall not apply to the acquisition or condemnation of property where consent is received from each person with a legal claim that has been identified or found.

History. — Code 1981, § 22-1-10.1, enacted by Ga. L. 2006, p. 39, § 5/HB 1313.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 780 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 306 et seq.

22-1-11. Determination of authority to exercise public domain.

Before the vesting of title in the condemnor and upon motion of the condemnee, or within ten days of the entry of the special master's award by entry of exception to the case, the court shall determine whether the exercise of the power of eminent domain is for a public use and whether the condemning authority has the legal authority to exercise the power of eminent domain and may stay other proceedings of the condemnation pending the decision of the court. The condemning authority shall bear the burden of proof by the evidence presented that the condemnation is for a public use as defined in Code Section 22-1-1. Nothing in this Code section shall be construed to require the condemnee to seek or obtain a special master's award prior to a hearing or decision by the court under this Code section.

History. — Code 1981, § 22-1-11, enacted by Ga. L. 2006, p. 39, § 5/HB 1313.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

JUDICIAL DECISIONS

Dismissal of action as nonjusticiable upheld. — Because the city had yet to file a condemnation action against a landowner, the landowner's suit seeking a public use determination under O.C.G.A. § 22-1-11 was properly dismissed, as it failed to present a justiciable controversy, and the city's mere inchoate intention to do so, if at all, did not give rise to a justiciable cause of action; moreover, if the appeals court construed § 22-1-11 to be applicable before the initiation of a condemnation action, the court would render meaningless the phrase "before the vesting of title in the condemnor," because that clarification would be redundant. Fox v. City of Cumming, 289 Ga. App. 803, 658 S.E.2d 408 (2008).

Property owner's interpretation was not lacking in justification. — Property owner's interpretation of O.C.G.A. § 22-1-11 was not so devoid of a justiciable issue or so lacking in substantial justification that it could not be reasonably believed that a court would accept that interpretation, such that an award of attorney fees against the owner pursuant to O.C.G.A. § 9-15-14(a) and (b) could not stand. Fox v. City of Cumming, 298 Ga. App. 134, 679 S.E.2d 365 (2009).

Cited in City of Marietta v. Summerour, 302 Ga. 645, 807 S.E.2d 324 (2017).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 17 et seq., 42 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 22 et seq.

22-1-12. Reimbursement to property owner of reasonable costs and expenses associated with condemnation proceedings.

In all actions where a condemning authority exercises the power of eminent domain, the court having jurisdiction of a proceeding instituted by a condemnor to acquire real property by condemnation shall award the owner of any right or title to or interest in such real property such sum as will in the opinion of the court reimburse such owner for his or her reasonable costs and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if:

(1) The final judgment is that the condemning authority cannot acquire the real property by condemnation; or

(2) The proceeding is abandoned by the condemning authority.

History. — Code 1981, § 22-1-12, enacted by Ga. L. 2006, p. 39, § 5/HB 1313.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009). For survey article on real property law, see 67 Mercer L. Rev. 193 (2015). For annual survey of real property law, see 68 Mercer L. Rev. 231 (2016).

JUDICIAL DECISIONS

Cited in City of Marietta v. Summerour, 302 Ga. 645, 807 S.E.2d 324 (2017); Morgan County v. Gay, 352 Ga. App. 555, 834 S.E.2d 576 (2019).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 112 et seq., 182 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 550 et seq.

22-1-13. Compensation to condemnee for relocation damages and expenses.

In addition to the types of relocation damages permissible under law, any condemnee that is displaced as a result of the condemnation shall be entitled to:

(1) Actual reasonable expenses in moving himself or herself, his or her family, business, farm operation, or other personal property within a reasonable distance from the property condemned;

(2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation;

(3) Such other relocation expenses as authorized by law; and

(4) With the consent of the condemnee, the condemnor may provide alternative site property as full or partial compensation.

History. — Code 1981, § 22-1-13, enacted by Ga. L. 2006, p. 39, § 5/HB 1313.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

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Cited in City of Marietta v. Summerour, 302 Ga. 645, 807 S.E.2d 324 (2017).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 805 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 181 et seq.

22-1-14. Valuation of condemned property.

(a) When property is condemned under this title or any other title of this Code, the value of the condemned property may be determined through lay or expert testimony and its admissibility shall be addressed to the sound discretion of the court.

(b) If any party to a condemnation proceeding seeks to introduce expert testimony as to the issue of just and adequate compensation, Code Section 24-7-702 shall not apply.

History. — Code 1981, § 22-1-14, enacted by Ga. L. 2006, p. 39, § 5/HB 1313; Ga. L. 2011, p. 99, § 38/HB 24.

Cross references. — Expert opinion testimony in civil actions, § 24-7-702.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006). For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Lay witness opinion inadmissible on cost to build bridge. — Trial court did not abuse the court's discretion in excluding, for insufficient foundation, a witness's opinion testimony concerning the cost to build a bridge over a waterway to cure trusts' lost usage after the condemnation of a ford over the waterway because the proffer the trusts made did not demonstrate pursuant to O.C.G.A. § 24-9-66 a basis upon which the witness could have formed the witness's own opinion on the cost to build the bridge apart from the single estimate the witness received; the trusts did not proffer that the witness obtained any other estimates concerning the cost to construct the bridge, spoke to anyone else about that cost, or possessed or sought to obtain any other information about that cost or about the accuracy of the estimate the witness had received. Martha K. Wayt Trust v. City of Cumming, 306 Ga. App. 790, 702 S.E.2d 915 (2010).

Cited in Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 223 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 141 et seq.

22-1-15. Process for condemnor to condemn property for public use; requirements; service.

(a) As used in this Code section, the term:

(1) "Condemnor" means a county, municipality, or consolidated government of this state.

(2) "Economic development" means any economic activity to increase tax revenue, tax base, or employment or improve general economic health, when the activity does not result in:

(A) Transfer of land to public ownership;

(B) Transfer of property to a private entity that is a public utility; or

(C) Lease of property to private entities that occupy an incidental area within a public project.

(3) "Public use" means the remedy of blight when economic development is a secondary or ancillary public benefit of condemnation.

(b) A condemnor seeking to condemn property for public use under this Code section shall first petition the superior court of the county having jurisdiction for a judgment in rem against such property seeking a determination as to whether the property complained of in the petition is blighted property.

(c) The petition described in subsection (b) of this Code section shall set forth:

(1) The facts showing the right to condemn;

(2) The property or interest to be taken;

(3) The names and residences of the persons whose property or interests are to be taken or otherwise affected, so far as known;

(4) A description of any unknown persons or classes of unknown persons whose rights in the property or interest are to be affected;

(5) A description of the appearance of the property and any structures thereon;

(6) Such other facts as are necessary for a full understanding of the cause;

(7) A statement setting forth the need of the court to review the evidence and determine whether such property meets the definition of blight;

(8) A prayer for an order to be issued by the court as may be proper and desired; and

(9) Whether any of the persons referred to in this subsection are minors or disabled.

(d)(1) Upon presentation of the petition set forth in subsection (c) of this Code section, the court shall issue an order requiring all parties of interest to appear at a time and place named in the order and make known their objections if any as to the question of whether the property shall be deemed blighted.

(2) The date of the hearing shall be no less than 30 days from the date such petition is filed.

(3) The order described in paragraph (1) of this subsection shall give directions for providing notice of the hearing and the service of such notices.

(4) It shall not be necessary to attach any other process to the petition except the order referred to in paragraph (1) of this subsection, and the cause shall proceed as in rem.

(e) All persons entitled to notice under the facts stated in the petition shall be personally served with a copy of the petition and order issued pursuant to subsection (d) of this Code section as in other causes at law, unless such service is waived in writing. All other service shall be made by the method as provided in Part 2 of Article 1 of Chapter 2 of this title, and all persons so served shall be deemed parties to the cause.

(f) In any cases where it seems to the court to be in the interest of justice and of more effective notice to cause additional notice or service to be given, it shall be within the court's discretion to so order. In such cases, such additional notice and service shall be made as ordered before the cause proceeds to final hearing. In cases where any taxes are alleged to be due or unpaid, the order shall direct that a separate notice to that effect be given the proper tax collector or tax commissioner.

(g) On the day named in the order made pursuant to subsection (d) of this Code section, or at any other time to which the hearing may be continued, the court, having first passed on and adjudged all questions touching service and notice, shall, after hearing from all persons responding and desiring to be heard, make such order as is appropriate based on the evidence as to whether or not the property shall be deemed blighted.

(h) Any property deemed blighted shall be described in the order adjudging such determination and contain a statement of the then current approved land use of the property, or in the case of vacant property, the last lawful use for which the property was occupied, and such property's future use shall be restricted to the same land use as stated in the order for a period of five years from the date of the order.

(i) A condemnor which has obtained an order under subsection (h) of this Code section declaring a property to be blighted shall within 60 days from such order, or in the event of an appeal, 60 days from the date when the remittitur of the appellate court is made the judgment of the court, file an action to condemn the property pursuant to the procedures set forth in Article 3 of Chapter 2 of this title. When a condemnor proceeds as set forth in Article 3 of Chapter 2 of this title, it shall attach a copy of the order issued under subsection (h) of this Code section.

History. — Code 1981, § 22-1-15, enacted by Ga. L. 2017, p. 754, § 2/HB 434.

Law reviews. — For article on the 2017 enactment of this Code section, see 34 Ga. St. U.L. Rev. 201 (2017). For annual survey on real property, see 69 Mercer L. Rev. 251 (2017).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 44 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 250 et seq.

ALR. — Measure of Just Compensation in Taking of Wetland, 40 A.L.R.7th Art. 7

Nondisclosure or Confidentiality Agreements in Cases Involving Products Liability, 40 A.L.R.7th Art. 2

CHAPTER 2

CONDEMNATION PROCEDURE GENERALLY

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22-2-135. Appointment of assessors; discretion of judge to have issues tried in first instance by jury.
22-2-136. Appeal from assessors' award.
22-2-137. Factors to be considered in determining or estimating just and adequate compensation; determination of date of taking; inclusion of date of approval of original location of highway in petition for condemnation; newspaper advertisement.
22-2-138. Scope of award or verdict; molding of award or verdict; power of court to adjudge condemnation of title upon deposit of amount of award or verdict into court; disposition of award by court.
22-2-139. Right of interested persons to intervene; effect of subse-

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quent proceedings on rights of condemnor.
22-2-140. Notification of court by tax collector or tax commissioner of taxes due on property or interest; actions by court to discharge lien.
22-2-141. Filing and recording of award, decree, and description of condemned property or interest or copies thereof; payment of fees to clerk of superior court.
22-2-142. Intent of article regarding effect on other methods of condemnation.

Cross references. — Procedure for obtaining private ways, see § 44-9-40 et seq.

Law reviews. — For comment on Georgia Power Co. v. Fountain, 207 Ga. 361, 61 S.E.2d 454 (1950), see 13 Ga. B.J. 341 (1951). For comment on State Hwy. Dep't v. Owens, 120 Ga. App. 647, 171 S.E.2d 770 (1969), and the right to inquire as to property owner's knowledge of condemnation prior to making improvements, see 22 Mercer L. Rev. 616 (1971).

JUDICIAL DECISIONS

Only public necessity can justify taking of private property. — The right of the humblest individual in the enjoyment of the individual's property must be protected. The right to take private property from the owner for public use often works extreme hardship and savors of oppression. Nothing but a public necessity can justify it, and then only in strict conformity with the law. Williams v. City of La Grange, 213 Ga. 241, 98 S.E.2d 617 (1957).

Condemnor chooses its method of procedure, and it is bound by the provisions of law following its own election. The property owner is also bound, although he did not choose the method of procedure. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Amendment of notice of condemnation proceedings is perfectly proper when the amendment's allowance does not adversely and substantially affect the condemnee's rights. Taylor v. Georgia Power Co., 129 Ga. App. 89, 198 S.E.2d 701 (1973).

Condemnor has burden of proving land value and consequential damages. — The burden of proof to show the value of the land taken and the consequential damages to the remaining property, if any, is on the condemnor. State Hwy. Dep't v. Smith, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Sole question for assessors or jury is amount of compensation. — When proceedings are instituted for the purpose of acquiring property for public purposes, the sole question which may be passed upon by the appointed assessors, or by a jury on appeal, is the amount of compensation to be paid to one whose property is being taken by the condemning authorities. Since the legislature has not expressly provided any method whereby the property owner can contest the question of public necessity or the right of condemnation, the property owner is left without a legal remedy and must resort to an independent action in a court of equity for relief. Williams v. City of La Grange, 213 Ga. 241, 98 S.E.2d 617 (1957); B. & W. Hen Farm, Inc. v. Georgia Power Co., 222 Ga. 830, 152 S.E.2d 841 (1966).

The sole power of the assessors relates to the value of the property taken and to no other question. City of Carrollton v. Walker, 215 Ga. 505, 111 S.E.2d 79 (1959).

In condemnation cases, the sole question for the consideration of the jury, upon an appeal from an award of the assessors or from an award of a special master, is the amount of compensation to be paid to the condemnee for the property taken under the condemnation proceeding and the amount of damages to the remaining property of the condemnee, if any. State

Hwy. Dep't v. Smith, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Appeal from award of assessors is de novo investigation, and the defendant in such proceedings may file an appropriate legal defense thereto. City of Macon v. Ries, 179 Ga. 320, 176 S.E. 21 (1934).

An appeal from the award of assessors in a condemnation proceeding is a de novo investigation, and the defendant may file appropriate pleadings and defenses therein as in other suits. Georgia Power Co. v. Lightfoot, 97 Ga. App. 330, 103 S.E.2d 99 (1958).

Law does not provide for intervention by any person claiming interest in property, whether or not such person was served with notice. Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961).

Statutory construction when procedural provisions incomplete. — When wording is taken from a prior statute, or when the law fails to be complete within itself, then reference to provisions for proceedings before assessors is permitted to fill in the void. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Contesting validity of condemnation proceedings. — When a property owner participates in proceedings but refuses to take the award of the assessors, and when the property owner acted promptly after the award of the assessors was made by filing the owner's petition in equity, alleging that the condemnor was proceeding illegally and had no right to condemn, and sought to enjoin the entering upon or taking possession of the owner's property, the property owner is not estopped from contesting the validity of the condemnation proceedings. Johnston v. Clayton County Water Auth., 222 Ga. 39, 148 S.E.2d 417 (1966).

Department of Transportation may not condemn municipally owned property as the legislature has not clearly granted such authority or created a procedure therefore, and as such grant may not be implied from statutory provisions generally establishing a procedure for state agencies to condemn "private property." DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

Condemnation for transportation purposes. — Even though the title to property to be condemned for transportation purposes was not in question, a city could choose to use procedures set forth in O.C.G.A. § 32-3-4 and, although it could have done so, was not required to use the procedures set forth in these condemnation statutes. Back v. City of Warner Robins, 217 Ga. App. 326, 457 S.E.2d 582 (1995).

OPINIONS OF THE ATTORNEY GENERAL

Date of taking is date of special master's or assessor's award. 1970 Op. Att'y Gen. No. 70-116.

Appraiser should be instructed to update appraisal to date of hearing before special master; this appraisal should contemplate that the amount of the award will be paid into court by condemnor within ten days of such hearing by the special master, and this is the amount that the appraiser should be prepared to testify to if and when there is an appeal of the matter to a jury in the superior court by either party thereto. 1970 Op. Att'y Gen. No. 70-116.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Eminent Domain: Lessee's Recovery of Compensation for Taking of Leasehold Interest, 56 POF3d 419.

Eminent Domain: Proof of Lack of Reasonable Necessity for Taking of Property, 71 POF3d 97.

ALR. — Expense of flagmen, gates, and automatic signals as items of compensation to railroad company across whose tracks a highway is laid, 4 A.L.R. 137.

Eminent domain: rights of one having inchoate right to dower, 5 A.L.R. 1347; 101 A.L.R. 697.

Liability upon abandonment of eminent domain proceedings for loss or expenses incurred by property owner, 31 A.L.R. 356; 121 A.L.R. 12; 121 A.L.R. 12; 92 A.L.R.2d 349.

Depreciation of property by location of school as taking or damaging within constitutional provision, 48 A.L.R. 1031.

Constitutionality of statute which permits consideration of enhanced value of lands not taken, in fixing compensation for property taken or damaged in exercise of eminent domain, 68 A.L.R. 784.

Constitutionality of provisions as to tribunal which shall fix the amount of compensation for taking of property in eminent domain, otherwise than objections that a trial by jury is necessary, 74 A.L.R. 569.

Right to compensation in eminent domain on basis of entire extent of property or complete use ultimately contemplated in excess of present requirements, 75 A.L.R. 855.

Right of tenant to remove buildings or other fixtures as affecting tenant's right to compensation in respect to such improvements in condemnation proceeding, 75 A.L.R. 1495.

Right of owner of dominant estate to have compensation for taking of easement by eminent domain determined with reference to land and improvements held in the dominant estate, 98 A.L.R. 640.

Right to abandon and effect of abandonment of eminent domain proceedings, 121 A.L.R. 12.

Special value or adaptability of property for purpose for which it is taken, as an element of, or matter for consideration in fixing, damages in condemnation proceedings, 124 A.L.R. 910.

Distinction between income or profits from business on land and income or profits from use of land, as affecting admissibility of evidence in that regard on question of damages in eminent domain, 134 A.L.R. 1125.

Increment to value, from project for which land is condemned, as a factor in fixing compensation, 147 A.L.R. 66.

Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit, 1 A.L.R.2d 878.

Constitutional rights of owner as against destruction of building by public authorities, 14 A.L.R.2d 73.

Attorney's fees as within statute imposing upon condemner liability for "expenses," "costs," and the like, 26 A.L.R.2d 1295.

Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street, 43 A.L.R.2d 1072; 42 A.L.R.3d 13; 42 A.L.R.3d 148.

Distribution as between life tenant and remainderman of proceeds of condemned property, 91 A.L.R.2d 963.

Liability upon abandonment of eminent domain proceedings for loss or expenses incurred by property owner, 92 A.L.R.2d 349.

Condemnor's right, as against condemnee, to interest on excessive money deposited in court or paid to condemnee, 99 A.L.R.2d 886.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 A.L.R.3d 901.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 A.L.R.3d 566.

Necessity of trial or proceeding separate from main condemnation trial or proceeding to determine divided interest in state condemnation award, 94 A.L.R.3d 696.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 A.L.R.3d 587.

Eminent domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold, 17 A.L.R.4th 337.

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 A.L.R.4th 765.

Damages resulting from temporary conditions incident to public improvements or repairs as compensable taking, 23 A.L.R.4th 674.

Eminent domain: measure and elements of damages or compensation for condemnation of public transportation system, 35 A.L.R.4th 1263.

Validity, construction, and effect of statute or lease provision expressly governing rights and compensation of lessee upon

condemnation of leased property, 22 A.L.R.5th 327.

ARTICLE 1

PROCEEDING BEFORE ASSESSORS

JUDICIAL DECISIONS

Condemnation procedures are constitutional, although no special tribunal to pass on the question of necessity is provided for. Savannah, Fla. & W. Ry. v. Postal Telegraph-Cable Co., 115 Ga. 554, 42 S.E. 1 (1902).

Condemnation procedures are general in nature and applies to all persons, natural and artificial, who come within its purview. Savannah, Fla. & W. Ry. v. Postal Telegraph-Cable Co., 115 Ga. 554, 42 S.E. 1 (1902).

Condemnation procedures provide method to be followed when private property is taken or damaged for public purposes, and the procedure herein prescribed cannot be adopted when the property is sought to be taken for a purely private purpose. Garbutt Lumber Co. v. Georgia & Ala. Ry., 111 Ga. 714, 36 S.E. 942 (1900); Jones & Co. v. Venable, 120 Ga. 1, 47 S.E. 549, 1 Ann. Cas. 185 (1904).

Condemnation procedures changed prior law enunciated in Parham v. Justices of Inferior Court, 9 Ga. 341 (1851), requiring a special act to authorize condemnation. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S.E. 312, 104 Am. St. R. 156, 2 Ann. Cas. 83 (1904).

Prior laws are superseded. — All prior laws providing different method of procedure for taking property under the power of eminent domain are superseded by the condemnation procedure. Alexander v. City Council, 134 Ga. 849, 68 S.E. 704 (1910); Bibb Brick Co. v. Central of Ga. Ry., 151 Ga. 83, 105 S.E. 833 (1921).

Act permitting municipality to condemn land in fee simple is unconstitutional. M. O'Dowd's Sons & Co. v. City Council, 141 Ga. 748, 82 S.E. 148 (1914).

Power granted by charter not affected. — The power granted the Georgia Railroad & Banking Company to condemn private property in the manner prescribed in its original charter as amended by the Act approved December 26, 1836 (Prince's Dig. 358), could not legally be, and was not affected by the passage of the condemnation laws. Gardner v. Georgia R.R. & Banking Co., 117 Ga. 522, 43 S.E. 863 (1903) (decided prior to enactment of § 46-8-121).

Power delegated to municipality. — If the power of eminent domain is conferred on the municipality by its charter, and no provision is made therein for its exercise, the general law embodied in the condemnation law is by implication a part of the law delegating the power. Stowe v. Town of Newborn, 127 Ga. 421, 56 S.E. 516 (1907). See Georgia R.R. & Banking Co. v. Mayor of Union Point, 119 Ga. 809, 47 S.E. 183 (1904); Zachry v. Mayor of Harlem, 138 Ga. 195, 75 S.E. 4 (1912).

"Property" for purposes of the condemnation law is limited to "private property" as indicated by the original enacting Act (Ga. L. 1894, p. 95) and by operation of O.C.G.A. § 22-1-8. DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

State property not subject to condemnation. — Statutes providing for condemnation of land for public use do not provide that the statutes shall apply to the state, nor is there anything to imply that the legislature intended such statutes to be applicable to the sovereign. Western Union Tel. Co. v. Western & A.R.R., 142 Ga. 532, 83 S.E. 135 (1914).

Interest of lessee of state property is not subject to condemnation. Western Union Tel. Co. v. Western & A.R.R., 142 Ga. 532, 83 S.E. 135 (1914).

Consent of property owner not necessary. — In condemnation proceedings, the willingness or unwillingness of the property owner to part with the owner's property is not a subject matter of consid-

eration. Central Ga. Power Co. v. Mays, 137 Ga. 120, 72 S.E. 900 (1911).

Assessors need not be county residents. — It is not necessary that assessors appointed in condemnation proceeding should be residents of the county where such proceeding is instituted. Hutchinson v. Copeland, 146 Ga. 357, 91 S.E. 206 (1917).

Power of condemnation may be exercised by railroad whose tracks cross the tracks of another. Atlantic & B.R.R. v. Seaboard Air-Line Ry., 116 Ga. 412, 42 S.E. 761 (1902).

Person or corporation engaged in quarrying business, who needs right of way for private railroad across the lands of others, is authorized in a case of necessity to obtain the right of way by condemnation proceedings. Francis Jones & Co. v. Venable, 120 Ga. 1, 47 S.E. 549, 1 Ann. Cas. 185 (1904).

Contesting validity of condemnation proceedings. — When a property owner participates in proceedings but refuses to take the award of the assessors, and when the property owner acted promptly after the award of the assessors was made by filing the owner's petition in equity, alleging that the condemnor was proceeding illegally and had no right to condemn, and sought to enjoin the entering upon or taking possession of the owner's property, the property owner is not estopped from contesting the validity of the condemnation proceedings. Johnston v. Clayton County Water Auth., 222 Ga. 39, 148 S.E.2d 417 (1966).

Statutory construction when procedural provisions incomplete. — When wording is taken from a prior statute, or when Ga. L. 1957, p. 387, § 1 (see O.C.G.A. § 22-2-100 et seq.) fails to be complete within itself, then reference to provisions for proceedings before assessors is permitted to fill in the void. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

If public authority does not proceed directly to condemn, injured citizen has right to compensation under the state Constitution. A cause of action for "inverse condemnation" will lie. Powell v. Ledbetter Bros., 251 Ga. 649, 307 S.E.2d 663 (1983).

Cited in Mitchell County v. Hudspeth, 151 Ga. 767, 108 S.E. 305 (1921); Ainslee v. County of Morgan, 151 Ga. 82, 105 S.E. 836 (1921); Commissioners of Decatur County v. Curry, 154 Ga. 378, 114 S.E. 341 (1922).

Part 1

General Provisions

Law reviews. — For article, "Liabilities of the Former Officer or Director," see 18 Ga. St. B.J. 150 (1982). For article, "Condemning Local Government Condemnation," see 39 Mercer L. Rev. 11 (1987).

22-2-1. "Condemnor" defined.

As used in this article, the term "condemnor" means any person or corporation which has been authorized by the General Assembly to exercise the power of eminent domain.

JUDICIAL DECISIONS

Railroads as condemnors. — See Central of Ga. R.R. v. Georgia Pub. Serv. Comm'n, 257 Ga. 217, 356 S.E.2d 865 (1987).

RESEARCH REFERENCES

ALR. — Jury trial under Rule 71A(h) of Federal Rules of Civil Procedure (Fed. Rules Civ. Proc., Rule 71A(h), 28 U.S.C.A.) in condemnation proceedings by United States, 164 A.L.R. Fed. 341.

Part 2

Notice of Condemnation

Cross references. — Service of process generally, § 9-11-4.

22-2-20. Persons entitled to receive notice generally.

Any person seeking to condemn property for public purposes shall serve a notice of condemnation on the owner of the property or of any remainder, reversion, mortgage, lease, security deed, or other interest therein.

History. — Ga. L. 1894, p. 95, § 4; Civil Code 1895, § 4660; Civil Code 1910, § 5209; Code 1933, § 36-304.

JUDICIAL DECISIONS

Statutory requirements as to service must be observed. — A condemnation proceeding under the power of eminent domain, even if it be considered as an action in rem, is a statutory proceeding, and statutory requirements as to service must be observed. Chattooga County v. Scott, 215 Ga. 68, 108 S.E.2d 876 (1959).

"Property" for purposes of O.C.G.A. T. 22, C. 2, Art. 1 is limited to "private property" as indicated by the original enacting Act (Ga. L. 1894, p. 95) and by operation of O.C.G.A. § 22-1-8. DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

Notice must describe property with same definiteness as deed. — Preliminary to the exercise of power of eminent domain for the purpose of opening a public street it is incumbent upon the city to serve a notice upon the owner of the property sought to be condemned, which shall describe the property, with the same definiteness as is required in a deed of conveyance of land. Glidden Co. v. City of Collins, 189 Ga. 656, 7 S.E.2d 266 (1940).

Preliminary to the exercise of the power granted by former Code 1933, § 36-801 (see O.C.G.A. § 22-3-20) for the purpose of erecting an electric line with necessary poles and fixtures, it was incumbent upon the power company to serve a notice on the owner of the property sought to be condemned, which notice shall describe the property with the same definiteness as was required in a deed of conveyance of land. Gunn v. Georgia Power Co., 205 Ga. 85, 52 S.E.2d 449 (1949).

Assessor to be appointed by hearing date fixed in notice. — Construing together former Code 1933, §§ 36-304, 36-311, 36-312, 36-313, 36-401 (see O.C.G.A. §§ 22-2-20, 22-2-25, 22-2-26, and 22-2-41), the landowner had until the day fixed for the hearing in the notice in which to appoint an assessor, which hearing shall not be less than 15 days from the time of serving the notice. A different ruling was not required by the decision in City of Elberton v. Adams, 130 Ga. 501, 61 S.E. 18 (1908). Sheppard v. City of Edison, 161 Ga. 907, 132 S.E. 218 (1926).

Notice cannot be amended while matter is before assessors. Nashville,

C. & S.L. Ry. v. Western Union Tel. Co., 142 Ga. 525, 83 S.E. 123 (1914).

Amendment reducing amount of property from fee simple to easement is permitted on appeal. Georgia G.R.R. v. Venable, 129 Ga. 341, 58 S.E. 864 (1907).

Judgment void when owner not named or served. — When the owner is not named or served in a three-appraiser proceeding, and neither acknowledges nor waives service, a judgment rendered in such proceeding is void, though the court had jurisdiction of the subject matter. DOT v. Garrett, 154 Ga. App. 104, 267 S.E.2d 643 (1980).

Mistake as to identity of owner does not absolutely void proceeding. — In rem proceedings involving eminent domain takings, when there has been an error as to the true owner of the property such that the true owner has not in fact been given notice and an opportunity to be heard, will not absolutely void a completed proceeding, and the true owner cannot have the judgment set aside, but is relegated to a claim in personam based on one's right to compensation. DOT v. Garrett, 154 Ga. App. 104, 267 S.E.2d 643 (1980).

Unauthorized notice given by president of corporation cannot be ratified by directors. Bridwell v. Gate City Term. Co., 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907).

Notice held sufficient. — A notice which stated that condemnor was a corporation of this state, and proposed to use the property for railway purposes and that the property was necessary for public purposes, is sufficient. Central of Ga. Ry. v. Bibb Brick Co., 149 Ga. 83, 99 S.E. 126 (1919).

Relief for owners of remainder interest not made parties to condemnation proceeding. — Owners of remainder interest in property who were not made parties to an in rem proceeding to condemn that property for a public purpose could obtain monetary relief for the value of their remainder but could not set aside the judgment of condemnation awarding title to a public body. Georgia Dep't of Transp. v. Woodward, 254 Ga. 587, 331 S.E.2d 557 (1985).

Lessee entitled to notice. — Lessee of property which was subjected to a partial taking was entitled to notice from the condemnor, not the lessor. Sims v. Foss, 201 Ga. App. 345, 411 S.E.2d 59 (1991).

Cited in Central of Ga. Ry. v. Thomas, 167 Ga. 110, 144 S.E. 739 (1928); Ammons v. Central of Ga. Ry., 215 Ga. 758, 113 S.E.2d 438 (1960); Robinson v. Transcontinental Gas Pipe Line Corp., 306 F. Supp. 201 (N.D. Ga. 1969).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 433 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 250 et seq., 270 et seq.

ALR. — Protection of rights of mortgagee in eminent domain proceedings, 58 A.L.R. 1534; 110 A.L.R. 542; 154 A.L.R. 1110.

Right to damages or compensation upon condemnation of property, of holder of unexercised option to purchase, 85 A.L.R.2d 588.

Rights and liabilities of parties to executory contract for sale of land taken by eminent domain, 27 A.L.R.3d 572.

Validity, construction, and effect of statute or lease provision expressly governing rights and compensation of lessee upon condemnation of leased property, 22 A.L.R.5th 327.

22-2-21. Direction of notice where owner a minor or under disability; appointment of guardian ad litem.

(a) If the owner of the property or of any interest therein is a minor or under any disability whatsoever, notice of condemnation shall be served upon his or her guardian.

(b) If there is no guardian, notice shall be served personally on the minor and on the judge of the probate court of the county where the property or interest is located. The judge shall thereupon appoint a guardian ad litem to represent the minor in the litigation.

(c) If the judge of the probate court is disqualified, by reason of interest or other cause, notice shall be served on the clerk of the superior court of the county where the property or interest is located, who shall appoint a guardian ad litem to represent the minor.

History. — Ga. L. 1894, p. 95, §§ 5-7; Civil Code 1895, §§ 4661, 4662, 4663; Civil Code 1910, §§ 5210, 5211, 5212; Code 1933, §§ 36-305, 36-306, 36-307; Ga. L. 2004, p. 161, § 4.1.

Editor's notes. — Ga. L. 2004, p. 161, § 16, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2005, and all appointments of guardians of the person or property made pursuant to former Title 29 shall continue in effect and shall thereafter be governed by the provisions of this Act."

JUDICIAL DECISIONS

Relief for owners of remainder interest not made parties to condemnation proceeding. — Owners of remainder interest in property who were not made parties to an in rem proceeding to condemn that property for a public purpose could obtain monetary relief for the value of their remaindermant but could not set aside the judgment of condemnation awarding title to a public body. Georgia Dep't of Transp. v. Woodward, 254 Ga. 587, 331 S.E.2d 557 (1985).

RESEARCH REFERENCES

ALR. — Proceeds of sale or condemnation of real property of infant or incompetent as real or personal property, 90 A.L.R. 897.

22-2-22. Serving notice on trustees of trust property and remaindermen.

If the property or interest sought to be condemned is held in trust or if the condemnation is directed toward property in which remainders have been created, notice shall be served on the trustee and on any persons who have an interest under the conveyance.

History. — Ga. L. 1894, p. 95, § 8; Civil Code 1895, § 4664; Civil Code 1910, § 5213; Code 1933, § 36-308.

RESEARCH REFERENCES

ALR. — Protection of rights of mortgagee in eminent domain proceedings, 58 A.L.R. 1534; 110 A.L.R. 542; 154 A.L.R. 1110.

22-2-23. Direction of notice where owner or guardian a nonresident; representation by judge of the probate court of nonresident owners and others whose addresses are unknown.

If the owner of the property or of any interest therein or the guardian of any owner resides out of the state, notice shall be served on the person in possession of the property or interest. Notice shall also be served on the nonresident owner or owners or the nonresident guardian as provided in Code Section 32-3-9. If the address of the owner or owners or of the guardian is not known, the judge of the probate court of the county where the property or interest is located shall act for such nonresident owners in the manner provided for unrepresented minors in Code Section 22-2-21.

History. — Ga. L. 1894, p. 95, § 9; Civil Code 1895, § 4665; Civil Code 1910, § 5214; Code 1933, § 36-309; Ga. L. 2004, p. 161, § 4.2.

Editor's notes. — Ga. L. 2004, p. 161, § 16, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2005, and all appointments of guardians of the person or property made pursuant to former Title 29 shall continue in effect and shall thereafter be governed by the provisions of this Act."

JUDICIAL DECISIONS

Statutory requirements as to service must be observed. — A condemnation proceeding under the power of eminent domain, even if it be considered as an action in rem, is a statutory proceeding, and statutory requirements as to service must be observed. Chattooga County v. Scott, 215 Ga. 68, 108 S.E.2d 876 (1959).

Cited in Whitney v. Central Ga. Power Co., 134 Ga. 213, 67 S.E. 197, 19 Ann. Cas. 982 (1910).

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Process, §§ 1 et seq., 32 et seq.

ALR. — Eminent domain: permissible modes of service of notice of proceedings, 89 A.L.R.2d 1404.

22-2-24. Direction of notice where owner unknown or where unknown remaindermen possible; right of owner to second assessment upon his appearance; return of surplus award to condemnor.

If the owner of the property or of any interest therein is unknown or if there is a possibility of unborn remaindermen having an interest, notice shall be served on the person in actual possession of the property or interest and also on the judge of the probate court of the county where the property or interest is located, who shall act for the unknown owner as provided for unrepresented minors in Code Section 22-2-21, provided that, whenever the unknown owner may appear, he may ask

for and have another assessment under the terms of this title and he shall receive the amount then assessed. If the second assessment is less than the first, the judge of the probate court shall return the surplus to the person originally condemning.

History. — Ga. L. 1894, p. 95, § 10; Civil Code 1895, § 4666; Civil Code 1910, § 5215; Code 1933, § 36-310.

JUDICIAL DECISIONS

Cited in City of Cartersville v. Sloan, 105 Ga. App. 754, 125 S.E.2d 522 (1962).

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Process, §§ 81 et seq., 100 et seq.

ALR. — Are different estates or interests in real property taken under eminent domain to be valued separately, or is entire property to be valued as a unit and the amount apportioned among separate interests, 69 A.L.R. 1263; 166 A.L.R. 1211.

Rights in condemnation award where land taken was subject to possible rights of reverter or reentry, 81 A.L.R.2d 568.

Distribution as between life tenant and remainderman of proceeds of condemned property, 91 A.L.R.2d 963.

22-2-25. Manner and time of service.

(a) Unless service is acknowledged or waived, a copy of the notice of condemnation shall be served by a sheriff or deputy at least 15 days before the day fixed for assessing the damage either:

(1) Personally on the owner of the property or other interest or on the representative of any owner or on any other person entitled to service;

(2) By leaving a copy of the notice at the residence of the owner, representative, or other person entitled to service; or

(3) In the case of an owner, representative, or other person entitled to service who is a nonresident, by mailing a copy to that person's last known address.

(b) In cases where service cannot be effected by leaving notice at place of residence or by personal service:

(1) Fifteen days before the day fixed for assessing the damages, the sheriff shall post the notice at the door of the courthouse of the county where the property or interest is located; and

(2) One week before the day fixed for assessing the damages, the sheriff shall cause the notice to be published once in the official organ of the county.

History. — Ga. L. 1894, p. 95, §§ 11, 12; Civil Code 1895, §§ 4667, 4668; Civil Code 1910, §§ 5216, 5217; Code 1933, §§ 36-311, 36-312; Ga. L. 1966, p. 248, § 1.

JUDICIAL DECISIONS

Assessor to be appointed by hearing date fixed in notice. — Construing together former Code 1933, §§ 36-304, 36-311, 36-312, 36-313, 36-401 (see O.C.G.A. §§ 22-2-20, 22-2-25, 22-2-26, and 22-2-41), the landowner had until the day fixed for the hearing in the notice in which to appoint an assessor, which hearing shall not be less than 15 days from the time of serving the notice. A different ruling was not required by the decision in City of Elberton v. Adams, 130 Ga. 501, 61 S.E. 18 (1908). Sheppard v. City of Edison, 161 Ga. 907, 132 S.E. 218 (1926).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 433 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 306 et seq. 72 C.J.S., Process, §§ 31 et seq., 32 et seq.

ALR. — Eminent domain: permissible modes of service of notice of proceedings, 89 A.L.R.2d 1404.

22-2-26. Contents of notice.

(a) All notices shall be directed to the owner of the property or of any interest therein and shall:

(1) Describe the property or franchise and the amount of interest therein sought to be condemned;

(2) Fix the time when the hearing will be had on the premises;

(3) Give the name of the assessor selected by the person seeking condemnation; and

(4) Request the owner or owners, the trustee, or the representative, as the case may be, to select an assessor.

(b) If the owner is unknown, the notice shall be directed to "all persons having any interest in the property located at _____ (description of location of property)."

History. — Ga. L. 1894, p. 95, § 13; Civil Code 1895, § 4669; Civil Code 1910, § 5218; Code 1933, § 36-313.

JUDICIAL DECISIONS

Notice must describe property with same definiteness as deed. — Preliminary to the exercise of power of eminent domain for the purpose of opening a public street it is incumbent upon the city to serve a notice upon the owner of the property sought to be condemned, which shall describe the property, with the same

definiteness as is required in a deed of conveyance of land. Glidden Co. v. City of Collins, 189 Ga. 656, 7 S.E.2d 266 (1940).

Preliminary to the exercise of the power granted by former Code 1933, § 36-801 (see O.C.G.A. § 22-3-20), for the purpose of erecting an electric line with necessary poles and fixtures, it was incumbent upon the power company to serve a notice on the owner of the property sought to be condemned, which notice shall describe the property with the same definiteness as was required in a deed of conveyance of land. Gunn v. Georgia Power Co., 205 Ga. 85, 52 S.E.2d 449 (1949).

The notice of an intention to condemn an easement in property which must be given under this section requires the condemnor to describe the property in which an easement is to be acquired with the same degree of definiteness as is required in a deed to land. B. & W. Hen Farm, Inc. v. Georgia Power Co., 222 Ga. 830, 152 S.E.2d 841 (1966); City of Atlanta v. Airways Parking Co., 225 Ga. 173, 167 S.E.2d 145 (1969).

Notice to secure easement of flowage held sufficient. — See Central Ga. Power Co. v. Maddox, 135 Ga. 246, 69 S.E. 109 (1910).

Assessor to be appointed by hearing date fixed in notice. — Construing together former Code 1933, §§ 36-304, 36-311, 36-312, 36-313, 36-401 (see O.C.G.A. §§ 22-2-20, 22-2-25, 22-2-26, and 22-2-41), the landowner had until the day fixed for the hearing in the notice in which to appoint an assessor, which hearing shall not be less than 15 days from the time of serving the notice. A different ruling was not required by the decision in City of Elberton v. Adams, 130 Ga. 501, 61 S.E. 18 (1908). Sheppard v. City of Edison, 161 Ga. 907, 132 S.E. 218 (1926).

Cited in Harrison v. State Hwy. Dep't, 183 Ga. 290, 188 S.E. 445 (1936); Hoch v. Candler, 190 Ga. 390, 9 S.E.2d 622 (1940).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 433 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 306 et seq. 72 C.J.S., Process, §§ 1 et seq., 32 et seq.

Part 3

Selection and Oath of Assessors

JUDICIAL DECISIONS

Condemnor chooses its method of procedure, and it is bound by the provisions of law following its own election. The property owner is also bound, although the owner did not choose the method of procedure. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Statutory construction when procedural provisions incomplete. — When wording is taken from a prior statute, or when Ga. L. 1957, p. 387, § 1 et seq. (see O.C.G.A. T. 22, C. 2, Art. 2) fails to be complete within itself, then reference to the provisions for proceedings before assessors is permitted to fill in the void. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Cited in United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); Minsk v. Fulton County, 83 Ga. App. 520, 64 S.E.2d 336 (1951); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960); Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961).

22-2-40. Selection of assessors generally; authority.

(a) The condemnor and the condemnee shall each select an assessor, and the two assessors so selected shall select a third assessor. No person shall be selected as an assessor unless such person is a real estate appraiser who has an appraiser classification of certified general appraiser granted under Chapter 39A of Title 43, the "Real Estate Appraiser and Classification Act." The condemnor shall be liable for the costs of the assessor selected by or for the condemnor, the condemnee shall be liable for the costs of the assessor selected by or for the condemnee, and the costs of the assessor selected by the other assessors or by the judge shall be split equally between the condemnor and condemnee. The combined total costs of all three assessors shall not exceed $500.00 per day.

(b) The assessors selected as provided in subsection (a) of this Code section shall have no authority to decide questions of law including, but not limited to, issues of compensability.

(c) The assessors selected as provided in subsection (a) of this Code section shall have the authority to refer questions of law to the appropriate superior court prior to entering an award. Neither party shall be prohibited from appealing a question of law to the superior court after the entry of the assessor's award.

History. — Ga. L. 1894, p. 95, § 15; Civil Code 1895, § 4671; Civil Code 1910, § 5220; Code 1933, § 36-402; Ga. L. 1998, p. 1539, § 1.

Law reviews. — For review of 1998 legislation relating to eminent domain, see 15 Ga. St. U.L. Rev. 115 (1998).

22-2-41. Selection of assessor by judge of the probate court; selection of assessor; rights of owners in selecting assessor.

(a) If any party to the condemnation notifies the judge of the probate court of the county where the property or interest is located that the owner of the property has failed to select an assessor, or that the owners or their representatives have failed to agree on an assessor, or that the owner is unknown, or that the owner or any one of the owners is a minor or otherwise under disability and without legal representative, the judge of the probate court shall select an assessor for such owners or representatives. If the judge of the probate court is disqualified, the clerk of the superior court of the county shall make the selection after like notice.

(b) All persons having any interest in the property sought to be condemned shall have equal rights in the selection of an assessor.

History. — Ga. L. 1894, p. 95, § 14; Civil Code 1895, § 4670; Civil Code 1910, § 5219; Code 1933, § 36-401.

JUDICIAL DECISIONS

Owner of land should have reasonable time after service of notice within which to select assessor. City of Elberton v. Adams, 130 Ga. 501, 61 S.E. 18 (1908).

Assessor to be appointed by hearing date fixed in notice. — Construing together former Code 1933, §§ 36-304, 36-311, 36-312, 36-313, 36-401 (see O.C.G.A. §§ 22-2-20, 22-2-25, 22-2-26, and 22-2-41), the landowner had until the day fixed for the hearing in the notice in which to appoint an assessor, which hearing shall not be less than 15 days from the time of serving the notice. A different ruling was not required by the decision in City of Elberton v. Adams, 130 Ga. 501, 61 S.E. 18 (1908). Sheppard v. City of Edison, 161 Ga. 907, 132 S.E. 218 (1926).

It is not essential that assessors be residents of county where proceeding is instituted. Hutchinson v. Copeland, 146 Ga. 357, 91 S.E. 206 (1917).

Cited in Patterson v. State Hwy. Dep't, 201 Ga. 860, 41 S.E.2d 260 (1947); Gilmore v. Sandersville R.R., 149 F. Supp. 725 (M.D. Ga. 1955); Miller v. Georgia Power Co., 222 Ga. 239, 149 S.E.2d 479 (1966); James v. Housing Auth., 233 Ga. 447, 211 S.E.2d 738 (1975).

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 389 et seq.

22-2-42. Failure of parties' nominees to select third assessor.

If the two assessors selected by the condemnor and the condemnee do not agree upon a third assessor within five days after the selection of the second assessor, the judge of the superior court of the county where the property or interest is situated shall, upon application of either party, of which the other shall have notice, make the selection.

History. — Ga. L. 1894, p. 95, § 15; Civil Code 1895, § 4671; Civil Code 1910, § 5220; Code 1933, § 36-402.

JUDICIAL DECISIONS

Cited in Gilmore v. Sandersville R.R., 149 F. Supp. 725 (M.D. Ga. 1955).

22-2-43. Oath of assessors.

The three assessors thus selected shall be sworn by some officer authorized to administer an oath "to do equal and exact justice between the parties according to law."

History. — Ga. L. 1894, p. 95, § 16; Civil Code 1895, § 4672; Civil Code 1910, § 5221; Code 1933, § 36-403.

JUDICIAL DECISIONS

No requirement that oath be taken before notice sent to condemnee. — There is no statutory provision requiring that the oath required by this section be taken before sending out the notice to the condemnee of the time and place when a hearing will be held. Landers v. Georgia Pub. Serv. Comm'n, 217 Ga. 804, 125 S.E.2d 495 (1962).

Cited in Jones v. Faulkner, 101 Ga. App. 547, 114 S.E.2d 542 (1960); State Hwy. Dep't v. King, 107 Ga. App. 220, 129 S.E.2d 577 (1963).

PART 4

HEARING

JUDICIAL DECISIONS

Eminent domain statutes must be strictly construed. — The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by this section, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression. City of Cartersville v. Long, 105 Ga. App. 762, 125 S.E.2d 539 (1962).

Burden of proving value of land and consequential damages on condemnor. — The burden of proof to show the value of the land taken and the consequential damages to the remaining property, if any, is on the condemnor. State Hwy. Dep't v. Smith, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Owner seeking injunction not estopped from naming assessor. — A property owner who files a petition to enjoin condemnation proceedings, alleging that the condemnor is proceeding illegally and had no right to condemn, is not estopped from maintaining his equitable petition by his participation thereafter in the condemnation proceedings by the naming of an assessor, where he has refused the award of the assessors. Johnston v. Clayton County Water Auth., 222 Ga. 39, 148 S.E.2d 417 (1966).

Compensation the sole issue for jury on appeal. — In condemnation cases, the sole question for the consideration of the jury, upon an appeal from an award of the assessors or from an award of a special master, is the amount of compensation to be paid to the condemnee for the property taken under the condemnation proceeding and the amount of damages to the remaining property of the condemnee, if any. State Hwy. Dep't v. Smith, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Cited in United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960); Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961).

OPINIONS OF THE ATTORNEY GENERAL

Date of taking is date of special master's or assessor's award. 1970 Op. Att'y Gen. No. 70-116.

Appraisal to be updated to date of hearing before special master. — When condemnation is necessary, the appraiser should be instructed to update his appraisal to the date of the hearing before the special master; this appraisal should contemplate that the amount of the award will be paid into court by condemnor within ten days of such hearing by the

special master, and this is the amount that the appraiser should be prepared to testify to if and when there is an appeal of the matter to a jury in the Superior Court by either party thereto. 1970 Op. Att'y Gen. No. 70-116.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 446 et seq., 483 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 335 et seq.

ALR. — Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, 9 A.L.R. 634.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like, 9 A.L.R. 842.

Right of tenant to remove buildings or other fixtures as affecting tenant's right to compensation in respect to such improvements in condemnation proceeding, 75 A.L.R. 1495.

Right to abandon and effect of abandonment of eminent domain proceedings, 121 A.L.R. 12.

Increment to value, from project for which land is condemned, as a factor in fixing compensation, 147 A.L.R. 66.

Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street, 43 A.L.R.2d 1072; 42 A.L.R.3d 13; 42 A.L.R.3d 148.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

Right to open and close argument in trial of condemnation proceedings, 73 A.L.R.2d 613.

Mandamus to compel ascertainment of compensation for property taken or for injuries inflicted under the power of eminent domain, 91 A.L.R.2d 991.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 A.L.R.2d 349.

Good will as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

22-2-60. Fixing of time for hearing by assessors; notification of parties.

If by reason of delay in appointing assessors or other cause the hearing cannot be conducted at the time fixed in the original notice, the assessors shall fix the time for the hearing and shall notify the parties in writing of the time and place of the hearing.

History. — Ga. L. 1894, p. 95, § 17; Civil Code 1895, § 4673; Civil Code 1910, § 5223; Code 1933, § 36-501.

JUDICIAL DECISIONS

Condemnor may dismiss proceedings before award has been made. Central Ga. Power Co. v. Nolan, 135 Ga. 443, 69 S.E. 561 (1910).

Cited in Patterson v. State Hwy. Dep't, 201 Ga. 860, 41 S.E.2d 260 (1947); James v. Housing Auth., 233 Ga. 447, 211 S.E.2d 738 (1975).

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, §§ 250 et seq., 335 et seq.

22-2-61. Power of assessors to subpoena and to compel attendance; right of parties to be represented.

(a) The assessors shall have the same power to issue subpoenas and compel the attendance of witnesses as is vested in the superior court.

(b) Parties may be represented in person or by attorney before the assessors.

History. — Ga. L. 1894, p. 95, §§ 18, 30; Civil Code 1895, §§ 4674, 4686; Civil Code 1910, §§ 5222, 5224; Code 1933, §§ 36-502, 36-503.

JUDICIAL DECISIONS

Cited in Glidden Co. v. City of Collins, 189 Ga. 656, 7 S.E.2d 266 (1940); O.K., Inc. v. State Hwy. Dep't, 213 Ga. 666, 100 S.E.2d 906 (1957); Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 409 et seq., 433 et seq.
C.J.S. — 29A C.J.S., Eminent Domain, § 409 et seq.
ALR. — Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213.

22-2-62. Evidence to be heard by assessors generally.

(a) The assessors shall hear all evidence offered by either party as to the value of the property or of any interest therein to be taken or used, the damages incurred by the owner of the property or of any interest therein, and the benefits to the owner accruing from the use of the property or interest by the condemnor.

(b) Prospective and consequential damages resulting from the taking may be considered if such damages are plain and appreciable.

(c) The increase of the value of the property or of any interest therein resulting from the proposed public improvement may be considered, but in no case shall such estimated increase deprive the owner of actual damages.

(d) In the estimation of the value of the property or other interest taken for public uses, such valuation need not be restricted to the agricultural or productive qualities of the property or interest, but inquiry may be made as to all other legitimate purposes to which the property or interest could be appropriated.

History. — Orig. Code 1863, §§ 622, 623; Code 1868, §§ 686, 687; Code 1873, §§ 647, 648; Code 1882, §§ 647, 648; Ga. L. 1894, p. 95, § 18; Civil Code 1895, §§ 567, 568, 4674; Civil Code 1910, §§ 688, 689, 5224; Code 1933, §§ 36-503, 36-505, 36-506.

Law reviews. — For comment on State Hwy. Dep't v. Thomas, 106 Ga. App. 849, 128 S.E.2d 520 (1962), see 14 Mercer L. Rev. 447 (1963).

JUDICIAL DECISIONS

Analysis

General Consideration
Value of Property Taken
1. In General
2. Value for All Purposes
3. Unique Property
4. Comparable Sales and Offers of Purchase
Prospective and Consequential Damages

General Consideration

Owner entitled to compensation for land taken and for damage to remaining land. — When a county, in the exercise of the county's corporate powers, appropriates land of an individual, and as a result the premises of the owner are rendered less valuable, the individual is entitled to just compensation for the land so taken, and also for the injury thus sustained. Terrell County v. York, 127 Ga. 166, 56 S.E. 309 (1906).

In condemnation proceedings, the condemnor is liable not only for direct damages for the actual land taken for the public use, but in addition thereto for all consequential damages which naturally and proximately flow from the taking of the land to the remainder of the parcel or tract of land not taken as tend to diminish the property's market value. Georgia Power Co. v. McCrea, 46 Ga. App. 279, 167 S.E. 542 (1933).

There are only two elements of damages to be considered in a condemnation proceeding: first, the market value of the property actually taken; second, the consequential damage that will naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting of the property to the purposes for which the property is condemned. Simon v. Department of Transp., 245 Ga. 478, 265 S.E.2d 777 (1980).

Law allows damages to property not actually appropriated in an eminent domain proceeding as consequential damages if such damages are shown. Justice v. State Hwy. Dep't, 100 Ga. App. 794, 112 S.E.2d 307 (1959).

Remote and speculative or possible damages are not allowed. McCrea v. Georgia Power Co., 46 Ga. App. 276, 167 S.E. 540 (1933).

Remote or merely speculative or possible damages are not allowed in considering the value of the land taken nor consequential damage to the land not taken. Southern Ry. v. Miller, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

The uses which may be considered in determining damages must be so reasonably probable as to have an effect on the present market value of the land; a purely imaginative or speculative value cannot be considered. State Hwy. Dep't v. Howard, 119 Ga. App. 298, 167 S.E.2d 177 (1969).

Anything that actually enhances value of land must be considered in order to meet the constitutional demand that the owner be paid, before the taking, adequate and just compensation. DOT v. Arnold, 154 Ga. App. 502, 268 S.E.2d 775 (1980).

Assessment of compensation covers all damages which result from proper construction, whether those damages were foreseen or not. Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

It cannot be assumed in condemnation proceedings that there will be negligent construction or operation of the project so as to cause damage in excess of that which would naturally and proximately result from the construction and operation thereof. McCrea v. Georgia Power Co., 46 Ga. App. 276, 167 S.E. 540 (1933).

Contiguity of parcels does not render the aggregate a tract. — The mere contiguity of several parcels of land belonging to one owner does not in itself render the lots in the aggregate an entire tract. Gaines v. City of Calhoun, 42 Ga. App. 89, 155 S.E. 214 (1930).

Platting and subdivision does not necessarily destroy unity of tract. — The mere platting of a tract of land and its subdivision into vacant building lots does not necessarily destroy the oneness or unity of the entire property. Gaines v. City of Calhoun, 42 Ga. App. 89, 115 S.E. 214 (1930).

Burden of proof is upon the condemnor, when the property has been taken or damaged, to establish by a preponderance of the evidence what amount of money constitutes just and adequate compensation. State Hwy. Bd. v. Shierling, 51 Ga. App. 935, 181 S.E. 885 (1935).

Only issue before assessors or jury on appeal is amount of compensation to be paid, and neither the assessors nor a jury can determine whether the condemnor is proceeding legally; the remedy of the landowners is to apply to a court of equity to enjoin the illegal proceedings. Garden Parks v. Fulton County, 88 Ga. App. 97, 76 S.E.2d 31 (1953).

Jurors are not absolutely bound to accept as correct opinions or estimates of witnesses as to the value of property, though uncontradicted by other testimony, but have the right to consider the nature of the property involved, together with any other fact or circumstance properly within their knowledge, throwing light upon the question, and the jurors may, by their verdict, fix either a lower or a higher value upon the property than that stated in the opinions or estimates of the witnesses. Southern v. Cobb County, 78 Ga. App. 58, 50 S.E.2d 226 (1948).

Charge substantially in the language of former Code 1933, §§ 36-503 through 36-506 (see O.C.G.A. §§ 22-2-62 and 22-2-63) was not error. State Hwy. Bd. v. Coleman, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

Cited in Glidden Co. v. City of Collins, 189 Ga. 656, 7 S.E.2d 266 (1940); State Hwy. Dep't v. Peavy, 77 Ga. App. 308, 48 S.E.2d 478 (1948); Housing Auth. v. McDonald, 87 Ga. App. 392, 74 S.E.2d 113 (1953); Georgia Power Co. v. Pittman, 92 Ga. App. 673, 89 S.E.2d 577 (1955); O.K., Inc. v. State Hwy. Dep't, 213 Ga. 666, 100 S.E.2d 906 (1957); United States of Am. v. Ivie, 163 F. Supp. 138 (N.D. Ga. 1957); Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959); Georgia Power Co. v. Faulk, 102 Ga. App. 141, 115 S.E.2d 733 (1960); Southwell v. State Hwy. Dep't, 104 Ga. App. 479, 122 S.E.2d 131 (1961); Fulton County v. Bailey, 107 Ga. App. 512, 130 S.E.2d 800 (1963); State Hwy. Dep't v. Kaylor, 110 Ga. App. 46, 137 S.E.2d 664 (1964); City of Jefferson v. Maddox, 116 Ga. App. 51, 156 S.E.2d 553 (1967); State Hwy. Dep't v. Cantrell, 119 Ga. App. 241, 166 S.E.2d 604 (1969); Pye v. State Hwy. Dep't, 226 Ga. 389, 175 S.E.2d 510 (1970); State Hwy. Dep't v. AMOCO, 125 Ga. App. 260, 187 S.E.2d 303 (1972); DOT v. Knight, 143 Ga. App. 748, 240 S.E.2d 90 (1977); Smith v. DeKalb County, 184 Ga. App. 628, 362 S.E.2d 435 (1987).

Value of Property Taken

1. In General

Market value of land for all available purposes is true measure of compensation. — When property is taken under power of eminent domain for a public use, the property's market value for all purposes for which the property is available is the true measure of the owner's compensation, the value of the property to the condemnor for the specific purpose for which the property is taken is not the basis for measuring the amount of compensation payable to the owner. State Hwy. Bd. v. Shierling, 51 Ga. App. 935, 181 S.E. 885 (1935).

Definition of market value of property. — Market value of property is what the property will bring when sold for cash

Value of Property Taken (Cont'd)
1. In General (Cont'd)

by a person ready and willing to sell, but under no obligation to sell, and when bought by a person ready and willing to buy, but under no obligation to buy. Housing Auth. v. Spink, 91 Ga. App. 72, 85 S.E.2d 80 (1954).

There are three recognized techniques for determining market value: replacement cost new less depreciation, income, and comparable sales. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Lost profits may be used as means of awarding just and adequate compensation because the income approach necessarily takes into account what future earnings would be were the property interest not extinguished. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Improvements on land are proper subjects for independent valuation in consideration of the just and adequate compensation for the total property taken. DOT v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Existing zoning regulations can be pertinent in a condemnation proceeding. DOT v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Consideration of zoning changes. — In determining value, jury may consider existing zoning and possible or probable future zoning changes which are sufficiently likely to have appreciable influence upon present market value. McDaniel Enters., Inc. v. Gwinnett County, 162 Ga. App. 419, 291 S.E.2d 738 (1982).

Privacy of land factor in fair market value. — Privacy afforded by location of realty, like a mountaintop, riverfront or oceanfront location, can also be a factor in determining market value of such realty. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

A panoramic or scenic view afforded by certain realty is an element to be included in assessing value. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Condemnee can recover compensation for loss of use of property during period of construction by the county, based on the property's rental value during that time, if the jury first finds that a loss of use had occurred and that the condemnee had taken reasonable steps to avoid such loss. DeKalb County v. Cowan, 151 Ga. App. 753, 261 S.E.2d 478 (1979).

Ascertaining value of land taken by subtracting value of land remaining from value of whole land before taking is error, since this permits the consideration of consequential damages or benefits in arriving at the value of the land remaining and may thus work harm to either the condemnor or the condemnee. Fulton County v. Power, 109 Ga. App. 783, 137 S.E.2d 474 (1964).

Evidence held inadmissible to show value of condemnee's property. — Evidence by a witness for the condemnee that an unspecified number of undescribed parcels of property in a block adjacent to that wherein was located the land sought to be condemned sold for a specified average price per square foot was inadmissible to show the value of the condemnee's property. Fulton County v. Cox, 99 Ga. App. 743, 109 S.E.2d 849 (1959).

Trial court erred in allowing testimony of the residential property's value in condemnation proceeding since the testimony provided speculative valuations based on the property's use as a commercial property at the time of the taking. Ga. Transmission Corp. v. Barron, 255 Ga. App. 645, 566 S.E.2d 363 (2002).

Evidence of factors which owner would present to prospective buyer properly admitted. — In determining market value of land taken or damaged in an eminent domain proceeding, it is proper for the trial court to admit proof of all factors which an owner could reasonably urge upon a prospective purchaser which could tend to favorably influence the person. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Evidence of property's highest and best use as convenience store properly admitted. — Trial court did not err in denying motion to strike the testimony

of condemnee's expert witness that the condemned property's highest and best use would be as a convenience store because of the property's location in relation to nearby industry and residential development since the testimony was based on relevant facts concerning existing local population and industry. DOT v. Kanavage, 183 Ga. App. 143, 358 S.E.2d 464 (1987).

As to effect of moving old road, and establishing new, as increasing and decreasing value, see Mallory v. Morgan County, 131 Ga. 271, 62 S.E. 179 (1908).

Instructions. — Although charge restricting jury, in determining value of property, to uses which may be lawfully made of the property at time of taking as set out in zoning ordinances then in effect was incorrect, there was no harm since the condemned property was zoned for industrial use at the time of taking and the appellant contended that the property's highest and best use was industrial. McDaniel Enters., Inc. v. Gwinnett County, 162 Ga. App. 419, 291 S.E.2d 738 (1982).

Instruction that the mere possibility that land might be used for a certain purpose is not enough to authorize a jury to consider the effect of such a possibility in determining the value of land. At least a reasonable probability must be shown by competent evidence to authorize consideration of such a prospective use in determining value. Elliott v. Henry County Water & Sewerage Auth., 238 Ga. App. 15, 517 S.E.2d 545 (1999).

2. Value for All Purposes

Prospective value of land for any purpose may be considered. — In arriving at the value of the land taken under condemnation proceedings, the value of the land, including the land's prospective value for any purpose, may be considered. Georgia Power Co. v. Carson, 46 Ga. App. 612, 167 S.E. 902 (1933); State Hwy. Bd. v. Coleman, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

All elements and uses of the land may be taken into consideration to determine the market value of the land taken and the consequential damages to the land not taken. However, under this sort of procedure, a witness may not be permitted to testify separately as to the value of each element. Southern Ry. v. Miller, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

Including value for specific use for which condemnor takes land. — The availability of property for the specific use for which the property was taken and to which the property is put by the condemnor is an element to be considered in estimating the value to the owner for all purposes for which the property is available. State Hwy. Bd. v. Shierling, 51 Ga. App. 935, 181 S.E. 885 (1935).

Regardless of probability that other uses will be made of land. — This section clearly states that the suitability of land for other uses, and not the probability that other uses will be made of the land, is the criterion for estimating the value of condemned land. Moore v. State Hwy. Dep't, 221 Ga. 392, 144 S.E.2d 747 (1965); State Hwy. Dep't v. Howard, 119 Ga. App. 298, 167 S.E.2d 177 (1969).

The test for estimating the value of land under this section is whether the land sought to be condemned could be used for other purposes, and not whether the land would be used for other purposes. Schoolcraft v. DeKalb County, 126 Ga. App. 101, 189 S.E.2d 915 (1972).

The test is whether the land is legitimately usable for other purposes, not whether such use is certain. Possible future uses will not influence the present market value of a tract unless there is a demand for such uses or those uses are otherwise reasonably probable. Georgia Power Co. v. Cole, 141 Ga. App. 806, 234 S.E.2d 382 (1977).

Charge on theory of reasonable probable use in a condemnation proceeding was erroneous because it allowed the jury to determine the value of the land on the date of the taking without ascribing any value to subterranean limestone deposits. Gunn v. DOT, 222 Ga. App. 684, 476 S.E.2d 46 (1996).

Use of charge allowing consideration of other uses of land. — Absent any evidence authorizing the jury to find that property being condemned was suitable for other uses or from which the jury might reasonably infer the property's suitability for other uses, a charge that the

Value of Property Taken (Cont'd)
2. Value for All Purposes (Cont'd)

jury might, in estimating the property's fair market value, consider other uses to which the property might be devoted was error. State Hwy. Dep't v. Whitehurst, 109 Ga. App. 737, 137 S.E.2d 371 (1964), later appeal, 112 Ga. App. 877, 146 S.E.2d 919 (1966).

Evidence insufficient to require charge on valuation for all purposes. — When 3.673 acres of a 40-acre tract of land plus a small drainage area was being condemned by the state highway department, evidence that all of the 40 acres, except about two acres where the owner's home stood, was in improved pasture, and part of the land taken was a narrow strip along a road on which the dwelling house of the owner faced, does not authorize an inference that the land taken was suitable for purposes other than agricultural so as to authorize a charge based on subsection (d) of this section. State Hwy. Dep't v. Cronic, 114 Ga. App. 348, 151 S.E.2d 486 (1966).

Failure to give instruction on valuation for all purposes held erroneous. — When there is some testimony that the condemned land is residential property and that there is an apartment complex and commercial property in the immediate vicinity it is error to refuse to give an instruction on valuation of the property for all purposes when requested in writing. Schoolcraft v. DeKalb County, 126 Ga. App. 101, 189 S.E.2d 915 (1972).

There being evidence from which the jury would be authorized to conclude that the property in question has reasonable potential for a use other than for that to which the property is presently being put, it is error to refuse to give the following written request to charge: "In the estimation of value of land taken for public uses, it is not restricted to its agricultural or productive qualities, but inquiry may be made as to all other legitimate purposes to which the property could be appropriated. The test in such cases is whether the land could be used for other purposes, not whether the land would be used for other purposes." DOT v. Katz, 169 Ga. App. 310, 312 S.E.2d 635 (1983).

There is no error in charging subsection (d) verbatim although there was no evidence of "agricultural qualities" of the property. DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624 (1975).

3. Unique Property

"Unique property" defined. — Unique property is simply property which must be valued by something other than the fair market value standard because there is no general market for such property. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Unique value is pecuniary value of certain property to the property's present owner, in a situation when the owner can find no other property equally well suited to the owner's use, and there is no taker on the open market at the pecuniary value of the property to the owner. In such a case there is no market value, which presupposes a willing-buyer willing-seller situation. Housing Auth. v. Troncalli, 111 Ga. App. 515, 142 S.E.2d 93 (1965).

Since valuing property at the property's fair market value presupposes a willing buyer and a willing seller, properties are "unique" such that fair market value will not afford just and adequate compensation when the properties are not of a type generally bought or sold in the open market. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Private riverfront land not unique. — Neither "privacy," which is inherent in ownership of all property, nor the fact that the condemned land was "riverfront" property, would authorize a charge on the condemned property having a value "peculiar" to the owner, or that the realty was "unique." Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 355, 299 S.E.2d 592 (1983).

Whether or not property is unique is a jury question. DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

Whether land taken or damaged in an eminent domain proceeding is unique or peculiar is a jury question. Macon-Bibb County Water & Sewerage

Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

"Unique" property is measured by variety of nonfair market methods of valuation, including the cost and income methods. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Recovery beyond fair market value for property of unique value. — The measure of the condemnee's recovery is the fair market value of the property taken, and a condemnee can only recover for the value that the property has to the condemnee over and above fair market value in such cases when the evidence shows that the property had some unique and special economic, not merely sentimental, value to the condemnee alone. Fulton County v. Cox, 99 Ga. App. 743, 109 S.E.2d 849 (1959).

When there is some evidence tending to show that the property to be taken has a unique suitability, due to the property's location, for the purpose to which the property was being put, it is not error to instruct the jury that the jury is not restricted to market value in determining just and adequate compensation. DeKalb County v. Cowan, 151 Ga. App. 753, 261 S.E.2d 478 (1979).

Recovery of business losses. — Business losses are recoverable as a separate item only if the property is "unique." DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

When a business belongs to the landowner, total destruction of the business at the location must be proven before business losses may be recovered as a separate element of compensation. DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

When the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land whether the destruction of the lessee's business is total or merely partial, provided only that the loss is not remote or speculative. DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

The damages sustained by a business are separate and apart from the damages sustained by the real estate on which it is located. Old S. Bottle Shop, Inc. v. Department of Transp., 175 Ga. App. 295, 333 S.E.2d 127 (1985).

Instruction on unique value erroneous unless evidence supports finding of such value. — An instruction to the jury in a condemnation case which inferentially authorizes the jury to award damages to the condemnee for the land taken based on the peculiar value of the land to the condemnee alone, as distinguished from the land's market value, generally is error when there is no evidence to authorize a finding that the land taken had any such peculiar value to the condemnee apart from the land's market value. State Hwy. Dep't v. Martin, 111 Ga. App. 428, 142 S.E.2d 84 (1965).

4. Comparable Sales and Offers of Purchase

Evidence of sale of similar property admissible. — Evidence of a sale of similar property, located near that condemned, at or near the time the condemnation proceeding was instituted, is admissible. Housing Auth. v. Spink, 91 Ga. App. 72, 85 S.E.2d 80 (1954).

On a question of the value of land sought to be condemned, it is competent to introduce evidence of sales of property similar to that in question, made at or near the time of the taking. The exact limit either of similarity or difference, or of nearness or remoteness in point of time is difficult, if not impossible, to prescribe by any arbitrary rule, but must to a large extent depend on the location and the character of the property and the circumstances of the case. Fulton County v. Cox, 99 Ga. App. 743, 109 S.E.2d 849 (1959).

Judicial determination of similarity required. — The introduction of evidence of particular sales is permitted after such evidence has been qualified by evidence of the similarity of the comparable property with the property being condemned or taken. After the introduction of such preliminary evidence of similarity, the trial judge must determine whether the comparable property is sufficiently similar or nearly like the property being condemned, and whether the time and manner of the particular sale are truly illustrative of the value of the property

Value of Property Taken (Cont'd)
4. Comparable Sales and Offers of Purchase (Cont'd)

being condemned. Fulton County v. Cox, 99 Ga. App. 743, 109 S.E.2d 840 (1959).

Generally, evidence of sales of property similar to that in question made at or near the time of the taking is competent evidence and may be considered to throw light on the issue of the value of the property sought to be condemned; however, the determination as to whether or not the witness testified as to comparable properties similar to that in question is within the sound discretion of the trial judge. Oglethorpe Power Corp. v. Seasholtz, 157 Ga. App. 723, 278 S.E.2d 429 (1981).

Comparability of sales upon which expert value witness bases opinion goes to weight of testimony, not the testimony's admissibility. Merritt v. Department of Transp., 147 Ga. App. 316, 248 S.E.2d 689 (1978).

Although unaccepted offers to purchase do not constitute evidence of market value, offers are admissible when offered as partial basis for opinion testimony as to value. Merritt v. Department of Transp., 147 Ga. App. 316, 248 S.E.2d 689 (1978).

Oral and not binding offers cast no light upon value. — Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. Southern Ry. v. Miller, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

When an offer to purchase excludes on its face the property to be taken and thus constitutes merely an offer to purchase the remainder, and another offer, while it includes the property to be taken, appears to be nothing more than a mere oral expression of willingness to purchase, unaccompanied by any proposed terms, any indication of ability to perform, or anything else which might indicate that it was a serious and bona fide offer, such "offers" are too susceptible of fabrication to be allowed into evidence even as a partial basis of opinion testimony. Merritt v. Department of Transp., 147 Ga. App. 316, 248 S.E.2d 689 (1978).

Sales of land to condemning authorities are inadmissible as evidence in condemnation proceedings on issue of value of land sought to be condemned. Oglethorpe Power Corp. v. Seasholtz, 157 Ga. App. 723, 278 S.E.2d 429 (1981).

Prospective and Consequential Damages

Measure of damages for injury to adjoining property is the diminution in the market value of the property. Terrell County v. York, 127 Ga. 166, 56 S.E. 309 (1906).

The measure of the consequential damages to adjoining property as a result of the condemnation of land for public purposes is the diminution of the value of the adjoining property measured by the difference between the fair market value of the property immediately before the condemnation and immediately after the condemnation. State Hwy. Bd. v. Coleman, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

The question of consequential damages involves the consideration of the value of the remaining land before the taking and the land's value after the taking and a determination of whether or not there was a difference in the value before and after the taking. Sumner v. State Hwy. Dep't, 110 Ga. App. 646, 139 S.E.2d 493 (1964); Simon v. Department of Transp., 245 Ga. 478, 265 S.E.2d 777 (1980).

Consequential benefits to remaining land may be considered to offset consequential damages. Fulton County v. Power, 109 Ga. App. 783, 137 S.E.2d 474 (1964).

Consequential benefits to remaining lands may be shown only as an offset against consequential damages and may not be used as an offset against the value of the land actually taken. Merritt v. Department of Transp., 147 Ga. App. 316, 248 S.E.2d 689 (1978).

Relevant factors in determining consequential damage to remaining property. — That condemned land produces items which may be sold in the market may be shown as affecting the land's market value. The presence or absence of water on the land may be shown in like manner. The extent of the land's

productive capacity and the amount and nature of available water is relevant. If these are removed or lessened by the improvements made, that is relevant in showing consequential damage to the property remaining. State Hwy. Dep't v. Harrison, 115 Ga. App. 349, 154 S.E.2d 723, overruled on other grounds, Willis v. Hill, 116 Ga. App. 848, 159 S.E.2d 145 (1967).

Evidence of noise and other elements allowed in determining consequential damages. — If shown to affect adversely the value and use of the condemnee's remaining property, evidence of noise and other elements may be taken into consideration by the jury in determining consequential damages. State Hwy. Dep't v. Augusta Dist. of N. Ga. Conference of Methodist Church, 115 Ga. App. 162, 154 S.E.2d 29 (1967).

It is error to admit evidence of diminution in value of adjoining property without evidence of fair market value before the condemnation, for such evidence is a mere conclusion of the witness without foundations of fact for the consideration of the jury. State Hwy. Bd. v. Coleman, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

Damage to one contiguous parcel determinable without reference to others. — When adjoining or contiguous parcels of land belonging to the same owner are put to separate and distinct uses, and do not together constitute one entire tract, damages to one of the parcels, as a result of the performance of public work in the neighborhood, is determinable without reference to the effect of the work upon the adjoining land. Gaines v. City of Calhoun, 42 Ga. App. 89, 155 S.E. 214 (1930).

Damage to portion of tract balanced against benefit to whole. — When a tract of land having a value and a peculiar utility as an entirety is affected by public work, the owner of the land, for the purpose of recovering damages resulting from the performance of the work, cannot sever from the entire tract a portion of the land which has been peculiarly damaged and recover damages without reference to the benefits accruing to the entire tract by virtue of the performance of the work. Gaines v. City of Calhoun, 42 Ga. App. 89, 155 S.E. 214 (1930).

Damages and judgment bar recovery of consequential damages except those resulting from negligent construction. — Since former Code 1933, §§ 36-503 through 36-506 (see O.C.G.A. §§ 22-2-62 and 22-2-63) plainly provide that the appraisers in proceedings to condemn private property for public purposes shall assess actual damages for the property taken and consequential damages to the property not taken, an award of damages and judgment of condemnation bar recovery of consequential damages except such as result from negligent and improper construction. Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

Proper construction not grounds for damages to remainder of property. — Construction that is done with due care and is proper is not grounds for recovery for damages to the remainder of the property of the condemnee. Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

Mistaken theory that construction would improve, not damage, remaining property. — When, due to a mistake of fact unmixed with negligence, the condemnation proceeding for a public road was conducted throughout upon the theory that the road would be paved at approximately grade level, thus improving rather than damaging the remaining abutting property, and there was nothing to indicate that a fill of from 25 to 40 feet would be made in front of the remaining property which would damage it in the amount of approximately $20,000.00, a petition in equity, alleging these facts and alleging that the mistake prevented the owners from proving this consequential damage, alleged a cause of action to set aside the award and the judgment of condemnation and to recover the full damages. Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

Valuation of adjacent land taken for bridge and roads. — It is proper, in order to arrive at just and adequate compensation in determining the value of adjacent land taken for the bridge and roads, that its prospective value as a bridge site

Prospective and Consequential Damages (Cont'd)

and its present value as a ferry site may be taken into the calculation. Mitchell County v. Hudspeth, 151 Ga. 767, 108 S.E. 305 (1921).

When land is taken for a public highway and bridge over a stream, the owners are not entitled to have the diminution or destruction of the profits of their ferry, due to the erection of the bridge, considered in determining the value of the property taken by the state for its highway and the bridge, when the franchise of the owners to operate the ferry is not exclusive. State Hwy. Bd. v. Willcox, 168 Ga. 883, 149 S.E. 182 (1929).

Condemnor's testimony, standing alone, held inadmissible on question of consequential damages. — When a limited access highway is condemned by the state, which highway cuts off several acres from the remainder of the land of the condemnee leaving those several acres without any access thereto, testimony offered by the condemnor that with access there would be no damage to the isolated land, standing alone, is inadmissible and without probative value on the question of consequential damages to those several acres without access. State Hwy. Dep't v. Howard, 124 Ga. App. 76, 183 S.E.2d 26 (1971).

Evidence admissible as to effect of condemnation on landowner's business. — In an action for value of the property taken by the Department of Transportation, evidence which was admissible to reflect how the condemnation had adversely affected the landowner's business had probative value and was admissible for consideration by the jury. DOT v. Delta Mach. Prods. Co., 157 Ga. App. 423, 278 S.E.2d 73 (1981).

Evidence insufficient to require charge on consequential benefits. — See Garden Parks v. Fulton County, 88 Ga. App. 97, 76 S.E.2d 31 (1953).

OPINIONS OF THE ATTORNEY GENERAL

Measure of damages for property taken is pecuniary loss to owner. — The measure of damages for property taken by the right of eminent domain, being compensatory in its nature, is the pecuniary loss sustained by the owner, taking into consideration all relevant factors; ordinarily this loss is represented by the fair market value of the property interest taken, but it may be fair and reasonable value of the property taken if in fact the market value would not coincide with the actual value thereof. 1958-59 Op. Att'y Gen. p. 271.

Damages ordinarily measured by market value. — Ordinarily, when an entire parcel of property is taken, or an entire leasehold interest is taken, the measure of the damages is the "market value" of the land or leasehold interest as the case might be; market value has been defined as the price which may be paid by one wishing but not required to buy, to one wishing but not required to sell. 1958-59 Op. Att'y Gen. p. 271.

Assessment of consequential damages. — In assessing consequential damages, the difference would lie in the valuation of the land which remains after condemnation, as compared with the value of that fragment of land before the condemnation was commenced; in considering this "damage," the assessors or jury would be bound to deduct from the whole damage, any increase which might result from the improvement respecting the sales value or market value of the tract not taken. 1958-59 Op. Att'y Gen. p. 273.

Payment of taxes on land taken by eminent domain. — The payment of city or county taxes is not a proper element of damages in a condemnation case; the payment of property taxes is a responsibility of the landowner only so long as the landowner, in fact, owns the property. The property owner or condemnee would be responsible for payment of taxes up to the date of taking; after that time, the responsibility for the payment of these taxes would lie upon the condemning body, if in fact that body is an entity which would have the responsibility for payment of these taxes. 1969 Op. Att'y Gen. No. 69-494.

Cost of moving personal property not an element of damage. — The cost of moving personal property from real estate which is taken for public purposes cannot be considered as an element of damage, as such; however, the cost of removal of either fixtures, buildings, or personalty, especially when used for business purposes, may be considered as one of the factors entering into a determination of the value of the real estate to the condemnee from whom the property is taken. 1958-59 Op. Att'y Gen. p. 271.

Moving cost may be illustrative of damage done by taking. — The cost of moving personal property may in many instances, be evidential as to, or illustrative of, the damage done to such personal property by the taking; such damage must be paid by the authority which so takes it for public purposes. 1958-59 Op. Att'y Gen. p. 276.

When area taken for right of way intersects building on tract involved, i.e., a portion of the building lies on land which is taken, and a portion of the building lies on land which is not taken, that portion of the building which extends upon the right of way may be severed if it is practicable to do so without destruction of the building; if severance would result in destruction, then the measure of damage to the building is its full value. 1958-59 Op. Att'y Gen. p. 273.

In circumstances when a condemnation causes the intersection of a building by the line drawn between the land taken and the land not taken, if it is impossible to sever the building and the whole building would be destroyed, the value of the land without the building taken would be charged against the condemnor; the true market value of the remaining portion of the condemnee's land without the building, of course, it being destroyed, would be compared with the value of that tract before taking. 1958-59 Op. Att'y Gen. p. 273.

Expense of removing facilities from railroad right-of-way. — There is no reason why the State Highway Department (now Department of Transportation) may not bear the expense (or that part which is not borne by the railroad or the United States government) of the temporary and permanent removal of facilities located on a railroad right of way. 1957 Op. Att'y Gen. p. 132.

No distinction can be drawn, as to the obligation to pay the cost of removal of facilities on a right of way, between temporary relocations and permanent relocations. 1957 Op. Att'y Gen. p. 132.

Powder company which is forced to move the location of its place of business because a highway is constructed too near the place of business is entitled to compensation for certain moving expenses. 1957 Op. Att'y Gen. p. 137.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 516 et seq.

C.J.S. — 25 C.J.S., Damages, § 1 et seq. 29A C.J.S., Eminent Domain, §§ 282 et seq., 346 et seq.

ALR. — Profits derived from business conducted on property taken by eminent domain as evidence of market value, 7 A.L.R. 163.

Right under constitutional provision against taking or damaging, to recover in other than an eminent domain proceeding, for consequential damages to property no part of which is taken, 20 A.L.R. 516.

Limitation applicable to action for consequential damage as result of taking or damaging of property for public use, 30 A.L.R. 1190; 139 A.L.R. 1288.

Right to interest in condemnation proceedings during owner's retention of possession, 32 A.L.R. 98.

Measure of damages or compensation where property is taken to widen street, 64 A.L.R. 1513.

Income as an element in determining value of property taken in eminent domain, 65 A.L.R. 455.

Measure and items of compensation or damages for flooding property under the right of eminent domain, 106 A.L.R. 955.

Right of property owner to compensation for diversion of traffic by relocation or rerouting of highway, 118 A.L.R. 921.

Elements and measure of compensation for power lines or other wire lines over private property, 124 A.L.R. 407.

Special value or adaptability of property for purpose for which it is taken, as an element of, or matter for consideration in fixing, damages in condemnation proceedings, 124 A.L.R. 910.

Distinction between income or profits from business on land and income or profits from use of land, as affecting admissibility of evidence in that regard on question of damages in eminent domain, 134 A.L.R. 1125.

Deduction of benefits in determining compensation or damages in eminent domain, 145 A.L.R. 7.

Increment to value, from project for which land is condemned, as a factor in fixing compensation, 147 A.L.R. 66.

Frustration of contractual rights as basis of claim for compensation where another's real property is taken in exercise of eminent domain, 152 A.L.R. 307.

Price at which one whose land is taken or damaged under power of eminent domain has sold, contracted to sell, or optioned land in question to third person as evidence of its market value in condemnation proceeding or related action for damages, 155 A.L.R. 262.

What physical construction amounts to a change of grade within statute relating to award of damages, 156 A.L.R. 416.

Determination in eminent domain proceedings of market value of land as affected by mineral deposits or similar conditions, 156 A.L.R. 1416.

Are different estates or interests in real property taken under eminent domain to be valued separately, or entire property to be valued as a unit and the amount apportioned among separate interests, 166 A.L.R. 1211.

Eminent domain: cost of repairs and improvements on property taken, as evidence of its value, 172 A.L.R. 236.

Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit, 1 A.L.R.2d 878.

Elements and measure of lessee's compensation for taking or damaging leasehold in eminent domain, 3 A.L.R.2d 286.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes, 16 A.L.R.2d 1113.

Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street, 43 A.L.R.2d 1072; 42 A.L.R.3d 13; 42 A.L.R.3d 148.

Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 A.L.R.2d 1453.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating to damages or the value of the property condemned, 80 A.L.R.2d 1270.

Admissibility on issue of value of real property of evidence of sale price of other real property, 85 A.L.R.2d 110.

Bad reputation of condemned property derived from its illegal use for gambling, prostitution, or the like, as factor decreasing compensation or damages, 87 A.L.R.2d 1156.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 A.L.R.2d 772.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 A.L.R.3d 901.

Eminent domain: deduction of benefits in determining compensation or damages in proceedings involving opening, widening, or otherwise altering highway, 13 A.L.R.3d 1149.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to landowner's unwillingness to sell property, 17 A.L.R.3d 1449.

Propriety and effect of argument or evidence as to financial status of parties in eminent domain proceeding, 21 A.L.R.3d 936.

Existence of restrictive covenant as element in fixing value of property condemned, 22 A.L.R.3d 961.

Eminent domain: admissibility, on issue of value of condemned real property, of rental value of other real property, 23 A.L.R.3d 724.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land on issue of value in eminent domain proceedings, 26 A.L.R.3d 780.

Measure of damages for condemnation of cemetery lands, 42 A.L.R.3d 1314.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 A.L.R.3d 860.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 A.L.R.3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 A.L.R.3d 581.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 A.L.R.3d 488.

Eminent domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 A.L.R.3d 534.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 A.L.R.3d 1122.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 A.L.R.3d 752.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Assemblage or plottage as factor affecting value in eminent domain proceedings, 8 A.L.R.4th 1202.

Eminent domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold, 17 A.L.R.4th 337.

Unaccepted offer for purchase of real property as evidence of value, 25 A.L.R.4th 571.

Unaccepted offer to sell or buy comparable real property as evidence of value of property in issue, 25 A.L.R.4th 615.

Eminent domain: compensability of loss of view from owner's property — state cases, 25 A.L.R.4th 671.

Unaccepted offer to sell or listing of real property as evidence of its value, 25 A.L.R.4th 983.

Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213.

Eminent domain: compensability of loss of visibility of owner's property, 7 A.L.R.5th 113.

Measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable, or noncommercial use, 29 A.L.R.5th 36.

22-2-63. Manner of assessment.

The assessors, or a majority of them, shall assess the value of the property or interest taken or used, or the damage done, shall assess the consequential damages to the property or interests not taken, and shall deduct from such consequential damages the consequential benefits to be derived by the owner from the operation of the franchise by the condemnor or from the carrying on of the business of the condemnor, provided that the consequential benefits assessed shall in no case exceed the consequential damages assessed; provided, further, that nothing in this Code section shall be so construed as to deprive the owner of the actual value of his property or interest so taken or used.

History. — Ga. L. 1894, p. 95, § 19; Civil Code 1895, § 4675; Civil Code 1910, § 5225; Code 1933, § 36-504.

Law reviews. — For comment on State Hwy. Dep't v. Lumpkin, 222 Ga. 727, 152 S.E.2d 557 (1966), see 3 Ga. St. B.J. 483 (1967).

JUDICIAL DECISIONS

Analysis

General Consideration
Value of Property Taken
Prospective and Consequential Damages

General Consideration

Damage construed. — The word "damaged," has a broader meaning than the word "taken," and is designed to impose liability on a condemnor for consequential injuries to property which would not otherwise exist. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Condemnor liable for both direct and consequential damages. — In condemnation proceedings, the condemnor is liable not only for direct damages for the actual land taken for the public use, but in addition thereto for all consequential damages which naturally and proximately flow from the taking of the land to the remainder of the parcel or tract of land not taken as tend to diminish its market value. Georgia Power Co. v. McCrea, 46 Ga. App. 279, 167 S.E. 542 (1933).

There are two elements to be considered in connection with the damages in condemnation cases, the actual value of the land taken and the consequential damage or consequential benefit to the remaining land. Fulton County v. Power, 109 Ga. App. 783, 137 S.E.2d 474 (1964).

Just and adequate compensation. — In an eminent domain proceeding, the "just and adequate compensation" due a condemnee is "the value" of the land taken, plus any consequential damages to the remainder if there is a partial taking, which may not be less than "the actual value" of the property taken or damaged. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Law allows damages to property not actually appropriated in an eminent domain proceeding as consequential damages if such damages are shown. Justice v. State Hwy. Dept., 100 Ga. App. 794, 112 S.E.2d 307 (1959).

Consequential damages must be recovered in condemnation proceeding. — Consequential damages to property not taken in a condemnation proceeding resulting from the proper construction and maintenance of the object for which the property is taken must be recovered, if recovered at all, in the condemnation proceeding. State Hwy. Dep't v. Kaylor, 110 Ga. App. 46, 137 S.E.2d 664 (1964).

Direct and consequential damages to be figured separately. — In any eminent domain case, the evidence and instructions to the jury should be such that the jurors are enabled to figure separately the value of the land or interest therein which is taken and the consequential damages to the land not taken, the latter of course balanced against any consequential benefits and by adding the two figures return a lump sum verdict which includes both items of depreciated value to the landowner. Georgia Power Co. v. Sinclair, 122 Ga. App. 305, 176 S.E.2d 639 (1970).

Remote and speculative or possible damages are not allowed. McCrea v. Georgia Power Co., 46 Ga. App. 276, 167 S.E. 540 (1933).

Remote or merely speculative or possible damages are not allowed in considering the value of the land taken nor consequential damage to the land not taken. Southern Ry. v. Miller, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

Value of land taken and consequential damages are matters of opinion. — The question of the value of the land taken and condemned and the amount of consequential damages to be assessed

against the condemnor for the remaining land are matters of opinion. Derrick v. Rabun County, 107 Ga. App. 229, 129 S.E.2d 583 (1963).

Measure of damages for property taken is pecuniary loss sustained by owner, taking into consideration all relevant factors. Ordinarily this loss is represented by the fair market value of the property interest taken, but it may be the fair and reasonable value of the property taken if in fact the market value would not coincide with the actual value thereof. Housing Auth. v. Savannah Iron & Wire Works, Inc., 91 Ga. App. 881, 87 S.E.2d 671 (1955).

Assessment of compensation covers all damages which result from proper construction, whether those damages are foreseen or not. Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

Only direct damages allowed when legal improvements properly erected and maintained. — When the public authorities properly erected and properly maintain the improvements authorized by law, the only right of action which is maintainable is that conferred by state constitutional provision; it does not sound in tort, and the recovery permitted is strictly limited to the direct damage inflicted by diminishing the market value of the property damaged, as measured by the difference in its market value before and immediately after the construction of the public works, excluding all consequential damages subsequently accruing, such as might be recoverable in an action sounding in tort, based on the maintenance of a continuing, abatable nuisance. Felton v. State Hwy. Bd., 51 Ga. App. 930, 181 S.E. 506 (1935).

It cannot be assumed in condemnation proceedings that there will be negligent construction or operation of the project so as to cause damage in excess of that which would naturally and proximately result from the construction and operation thereof. McCrea v. Georgia Power Co., 46 Ga. App. 276, 167 S.E. 540 (1933).

Contiguity of parcels does not render the aggregate a tract. — The mere contiguity of several parcels of land belonging to one owner does not in itself render the lots in the aggregate an entire tract. Gaines v. City of Calhoun, 42 Ga. App. 89, 155 S.E. 214 (1930).

Platting and subdivision does not necessarily destroy unity of tract. — The mere platting of a tract of land and its subdivision into vacant building lots does not necessarily destroy the oneness or unity of the entire property. Gaines v. City of Calhoun, 42 Ga. App. 89, 115 S.E. 214 (1930).

Assessment by majority of assessors sufficient. — It is not necessary to the validity of an assessment in a condemnation proceeding that all three of the assessors agree upon a valuation. A majority is sufficient. Cable v. State Hwy. Bd., 208 Ga. 593, 68 S.E.2d 564 (1952).

Assessment made by two assessors in absence of third cannot be collaterally attacked in a suit for injunction. If the assessment is irregular or erroneous, it must be vacated and set aside in a direct attack upon the award. Cable v. State Hwy. Bd., 208 Ga. 593, 68 S.E.2d 564 (1952).

In a proceeding to condemn only a portion of a tract of land the only question to be determined by the jury is the amount which the condemnor should pay as just and adequate compensation for the part taken and consequential damages, if any, to the remaining portion of the tract, as such damages may be offset, but not exceeded, by consequential benefits. Alabama Power Co. v. Chandler, 217 Ga. 550, 123 S.E.2d 767 (1962).

Damages allowed for loss of right of access. — When a street upon which a lot abuts is closed by an obstruction at an intersecting street, which, as respects the lot, makes the street upon which it abuts a cul-de-sac, although the obstruction is neither immediately in front of the lot nor touches the lot, and the obstruction thereby materially diminishes and curtails the right of the owner to the free and uninterrupted use of the street in front of the lot, as a means of access to and from different parts of the city, it constitutes a special damage to the lot, different in kind from that inflicted upon the community in general, and the owner has a right of action in damages therefor. Felton v. State

General Consideration (Cont'd)

Hwy. Bd., 51 Ga. App. 930, 181 S.E. 506 (1935).

When a highway or roadway to which the condemnee has a right of access is condemned as part of a limited access highway the condemnor must necessarily pay for the taking of the right of access. State Hwy. Dep't v. Ford, 112 Ga. App. 270, 144 S.E.2d 924 (1965).

No damages for easement to and from limited access highway. — When land is condemned for use as a new limited access highway the condemnee is not entitled to damages, actual or consequential, for lack of access to that new highway by reason of any rights of easement for ingress and egress to and from that highway. State Hwy. Dep't v. Ford, 112 Ga. App. 270, 144 S.E.2d 924 (1965).

Damages for inconvenient access not compensable. — Damages for mere inconvenience and circuity of travel in the access to one's property are not compensable in an eminent domain proceeding. State Hwy. Dep't v. Cantrell, 119 Ga. 241, 166 S.E.2d 604 (1969).

Compensable elements of damage do not include prepayment interest penalties. DeKalb County v. United Family Life Ins. Co., 235 Ga. 417, 219 S.E.2d 707 (1975).

Examination of condemnee when perpetual easement for aviation purposes sought. — When the condemnor seeks a perpetual easement for aviation purposes, in, to, upon and over, all of condemnee's property, the examination of the condemnee is not limited to planes using only one particular runway. Schoolcraft v. DeKalb County, 126 Ga. App. 101, 189 S.E.2d 915 (1972).

Charge substantially in the language of former Code 1933, §§ 36-503 through 36-506 (see O.C.G.A. §§ 22-2-62 and 22-2-63) was not error. State Hwy. Bd. v. Coleman, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

Failure to instruct on definition of "consequential damages". — Since the court's jury charge never defined the term "consequential damages" and was vague in charging the method of determining consequential damages, the charge was too vague and that part of the judgment awarding consequential damages was overruled. DOT v. Clower, 170 Ga. App. 750, 318 S.E.2d 161 (1984).

Cited in Nalley Land & Inv. Co. v. State Hwy. Bd., 49 Ga. App. 258, 175 S.E. 269 (1934); Florida Blue Ridge Corp. v. Tennessee Elec. Power Co., 106 F.2d 913 (5th Cir. 1939); State Hwy. Dep't v. Peavy, 77 Ga. App. 308, 48 S.E.2d 478 (1948); Housing Auth. v. McDonald, 87 Ga. App. 392, 74 S.E.2d 113 (1953); Georgia Power Co. v. Pittman, 92 Ga. App. 673, 89 S.E.2d 577 (1955); O.K., Inc. v. State Hwy. Dep't, 213 Ga. 666, 100 S.E.2d 906 (1957); Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959); State Hwy. Dep't v. Robinson, 103 Ga. App. 12, 118 S.E.2d 289 (1961); Fulton County v. Bailey, 107 Ga. App. 512, 130 S.E.2d 800 (1963); State Hwy. Dep't v. Stevens, 128 Ga. App. 418, 196 S.E.2d 890 (1973); DOT v. Knight, 143 Ga. App. 748, 240 S.E.2d 90 (1977); Georgia Power Co. v. 54.20 Acres of Land, 563 F.2d 1178 (5th Cir. 1977); Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980); DOT v. Willis, 165 Ga. App. 271, 299 S.E.2d 82 (1983); Smith v. DeKalb County, 184 Ga. App. 628, 362 S.E.2d 435 (1987).

Value of Property Taken

Owner entitled to fair market value for property taken. — An owner of property taken for public purposes is entitled to receive as compensation therefor the fair market value. State Hwy. Bd. v. Warthen, 54 Ga. App. 759, 189 S.E. 76 (1936).

"Value," as used in reference to land taken under eminent domain, is a relative term depending on the circumstances. Thus, under some circumstances, "the value" might be the actual value, the market value, the salable value, the reasonable value, and the cash value. State Hwy. Bd. v. Bridges, 60 Ga. App. 240, 3 S.E.2d 907 (1939).

It was not reversible error to charge the jury that "value," which is qualified in this section as "actual value," is the fair and reasonable value of a strip of land actually taken. Nor was it reversible error, after so charging, not to qualify and limit the word "value" by use of the words "market value." State Hwy. Bd. v. Bridges, 60 Ga.

App. 240, 3 S.E.2d 907 (1939).

Factors to be considered in estimating property value. — All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value. State Hwy. Bd. v. Warthen, 54 Ga. App. 759, 189 S.E. 76 (1936).

Reproduction cost may always be used as a factor involved in the valuation of property, together with other factors such as depreciation and the nature of the property interest seized, in determining market value. Housing Auth. v. Savannah Iron & Wire Works, Inc., 91 Ga. App. 881, 87 S.E.2d 671 (1955).

In determining value of land actually taken, consequential damages or benefits should not be considered, these being separate elements which should be considered separately. State Hwy. Bd. v. Warthen, 54 Ga. App. 759, 189 S.E. 76 (1936).

Pro rata valuation in partial taking not authorized. — Charge to jury which employed a pro rata method of assessing the value of a partial taking was erroneous; statutes which govern the manner of assessment and set out the factors considered in determining compensation do not express such a relational mode. Bland v. Bulloch County, 205 Ga. App. 317, 422 S.E.2d 223, cert. denied, 205 Ga. App. 899, 422 S.E.2d 223 (1992).

Prospective value of land for any purpose may be considered. — In arriving at the value of the land taken under condemnation proceedings, the value of the land, including its prospective value for any purpose, may be considered. Georgia Power Co. v. Carson, 46 Ga. App. 612, 167 S.E. 902 (1933).

Prospective value for any purpose may be considered in determining the value of land taken under condemnation proceedings. State Hwy. Bd. v. Coleman, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

All elements and uses of the land may be taken into consideration to determine the market value of the land taken and the consequential damages to the land not taken. However, under this sort of procedure, a witness may not be permitted to testify separately as to the value of each element. Southern Ry. v. Miller, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

Evidence of voluntary sales of similar lands admissible. — In a proceeding to condemn land, it is competent for the purpose of showing the value of the land being taken to introduce evidence of voluntary sales of other similar lands in the same vicinity made at or near the time of the taking and the price paid therefor. Alabama Power Co. v. Chandler, 217 Ga. 550, 123 S.E.2d 767 (1962).

Oral and not binding offers cast no light upon value. — Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. Southern Ry. v. Miller, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

Ascertaining value of land taken by subtracting value of land remaining from value of whole land before taking is error, since this permits the consideration of consequential damages or benefits in arriving at the value of the land remaining and may thus work harm to either the condemnor or the condemnee. Fulton County v. Power, 109 Ga. App. 783, 137 S.E.2d 474 (1964).

In eminent domain proceedings, evidence of the difference between the value of the whole property, that taken and that not taken, before the taking and after the taking is without probative value as to the actual value of the land taken and the consequential damage to that not taken. DOT v. Brand, 149 Ga. App. 547, 254 S.E.2d 873 (1979).

Recovery beyond fair market value for property of unique value. — Although market value is ordinarily the measure of damages, if property has a unique or special use to the owner, just and adequate compensation should be determined without restriction to market value as such. DeKalb County v. Cowan, 151 Ga. App. 753, 261 S.E.2d 478 (1979).

Admission of evidence of income producing qualities from land. — When evidence as to the income producing qualities and capabilities of the land condemned is objected to, and the trial court instructs the jury that the jurors are to consider this evidence only in arriving at a

Value of Property Taken (Cont'd)

market value of the property taken and consequential damages to the remainder, there is no error in the admission of such evidence. State Hwy. Dep't v. Harrison, 115 Ga. App. 349, 154 S.E.2d 723, overruled on other grounds, Willis v. Hill, 116 Ga. App. 848, 159 S.E.2d 145 (1967), rev'd, 224 Ga. 263, 161 S.E.2d 281 (1968).

Recovery of business losses. — The damages sustained by a business are separate and apart from the damages sustained by the real estate on which the business is located. Old S. Bottle Shop, Inc. v. Department of Transp., 175 Ga. App. 295, 333 S.E.2d 127 (1985).

Prospective and Consequential Damages

Measure of consequential damages to adjoining property as a result of the condemnation of land for public purposes is the diminution of the value of the adjoining property measured by the difference between the fair market value of the property immediately before the condemnation and immediately after the condemnation. State Hwy. Bd. v. Coleman, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

The loss of value inherent in the land remaining after a strip of the land is taken is the difference between the greatest market value of land not taken before the strip is taken and improvements made less the market value of the remainder after the strip is taken off and improvements made. Swiney v. State Hwy. Dep't, 116 Ga. App. 667, 158 S.E.2d 321 (1967).

Damages still "consequential" as long as value inheres in remaining fee. — The loss of value in land remaining after a strip is taken may approach the full value of the land, but it is still consequential damages so long as some value inheres in the fee remaining in the condemnee. Swiney v. State Hwy. Dep't, 116 Ga. App. 667, 158 S.E.2d 321 (1967).

Consequential benefits to remaining lands may be shown only as offset against consequential damages and may not be used as an offset against the value of the land actually taken. Merritt v. Department of Transp., 147 Ga. App. 316, 248 S.E.2d 689 (1978).

Consequential benefits refer to benefits accruing to property interests remaining in plaintiff at the site after the taking or damaging of a part thereof, and have no application when the entire interest of the plaintiff has been appropriated. Housing Auth. v. Savannah Iron & Wire Works, Inc., 91 Ga. App. 881, 87 S.E.2d 671 (1955).

Reversion of title to old road to owner not consequential benefit. — When land is condemned for the purpose of changing the location of a highway, the "consequential benefits to be derived by the owner" do not include the benefit which might be derived from the reversion to the owner of the title to the old road if and when abandoned. St. Clair v. State Hwy. Bd., 45 Ga. App. 488, 165 S.E. 297 (1932).

It is error to admit evidence of diminution in value of adjoining property without evidence of fair market value before the condemnation for such evidence is a mere conclusion of the witness without foundations of fact for the consideration of the jury. State Hwy. Bd. v. Coleman, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

Damage to one contiguous parcel determinable without reference to others. — When adjoining or contiguous parcels of land belonging to the same owner are put to separate and distinct uses, and do not together constitute one entire tract, damages to one of the parcels, as a result of the performance of public work in the neighborhood, is determinable without reference to the effect of the work upon the adjoining land. Gaines v. City of Calhoun, 42 Ga. App. 89, 155 S.E. 214 (1930).

Damage to portion of tract balanced against benefit to whole. — When a tract of land having a value and a peculiar utility as an entirety is affected by public work, the owner of the land, for the purpose of recovering damages resulting from the performance of the work, cannot sever from the entire tract a portion of the land which has been peculiarly damaged and recover damages without reference to the benefits accruing to the entire tract by virtue of the performance of the work. Gaines v. City of Calhoun, 42

Ga. App. 89, 155 S.E. 214 (1930).

Destruction of unity of property as basis for consequential damages. — In a condemnation action involving a farm, when there is evidence to show that the land taken will, by intrusion on the general layout of the property, tend to destroy the unity of the farm and thus depreciate the market value of the part not taken, this is a legitimate subject for consideration in determining the amount of consequential damages. DOT v. Brown, 155 Ga. App. 622, 271 S.E.2d 876 (1980).

Opinion of witness as to diminution in value of land. — After a witness has given the witness's opinion of the value of land which it is claimed would be subject to consequential damages by reason of condemning another part of the tract, and has stated that the structure created by the condemnor caused injury to the balance of the land, there is no error in permitting the witness to give the witness's opinion as to the diminution in the value of the land. State Hwy. Bd. v. Coleman, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

Testimony and photographs properly admitted in determining consequential damages or benefits. — Testimony as to the replanting of trees and moving house back to the same relative location from the street as existed before the condemnation, and also certain photographs of the property in question, were properly admitted as evidence for consideration by the jury in determining consequential damages or benefits. State Hwy. Bd. v. Warthen, 54 Ga. App. 759, 189 S.E. 76 (1936).

Damages and judgment bar recovery of consequential damages except those resulting from negligent construction. — Since former Code 1933, §§ 36-503 through 36-506 (see O.C.G.A. §§ 22-2-62 and 22-2-63) plainly provide that the appraisers in proceedings to condemn private property for public purposes shall assess actual damages for the property taken and consequential damages to the property not taken, an award of damages and judgment of condemnation bar recovery of consequential damages except such as result from negligent and improper construction. Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

Proper construction not grounds for damages to remainder of property. — Construction that is done with due care and is proper is not grounds for recovery for damages to the remainder of the property of the condemnee. Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

Consequential damages for improper construction subject of separate damage suit. — Consequential damages to the remainder of the property caused by the negligent or improper construction of the improvement are not proper for consideration in a condemnation proceeding, but are the subject of a separate suit for damages. State Hwy. Dep't v. Kaylor, 110 Ga. App. 46, 137 S.E.2d 664 (1964).

Mistaken theory that construction would improve, not damage, remaining property. — When, due to a mistake of fact unmixed with negligence, the condemnation proceeding for a public road was conducted throughout upon the theory that the road would be paved at approximately grade level, thus improving rather than damaging the remaining abutting property, and there was nothing to indicate that a fill of from 25 to 40 feet would be made in front of the remaining property which would damage it in the amount of approximately $20,000.00, a petition in equity, alleging these facts and alleging that the mistake prevented the owners from proving this consequential damage, alleged a cause of action to set aside the award and the judgment of condemnation and to recover the full damages. Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

Jury charge regarding consequential damages. — The court did not err in charging the jury where in part of the charge the correct rules as contained in this section were given as to the assessment of consequential damages in case the consequential benefits equaled or exceeded the consequential damages. Georgia, Fla. & Ala. Ry. v. Norman, 140 Ga. 42, 78 S.E. 411 (1913).

Instruction held reversible error. — Instructing the jury that the jury could reduce the amount of consequential damages to the remainder of the property by

Prospective and Consequential Damages (Cont'd)

the amount of special consequential benefits was reversible error since there was no evidence from which the jury could have formed a reasonable estimate of the amount or value of such benefits. Perry v. Department of Transp., 193 Ga. App. 254, 387 S.E.2d 445 (1989).

OPINIONS OF THE ATTORNEY GENERAL

Assessment of consequential damages. — In assessing consequential damages, the difference would lie in the valuation of the land which remains after condemnation, as compared with the value of that fragment of land before the condemnation was commenced; in considering this "damage," the assessors or jury would be bound to deduct from the whole damage, any increase which might result from the improvement respecting the sales value or market value of the tract not taken. 1958-59 Op. Att'y Gen. p. 273.

Payment of taxes on land taken by eminent domain. — The payment of city or county taxes is not a proper element of damages in a condemnation case; the payment of property taxes is a responsibility of the landowner only so long as the landowner, in fact, owns the property. The property owner or condemnee would be responsible for payment of taxes up to the date of taking; after that time, the responsibility for the payment of these taxes would lie upon the condemning body, if in fact that body is an entity which would have the responsibility for payment of these taxes. 1969 Op. Att'y Gen. No. 69-494.

Cost of transferring personal business articles to new location cannot be charged as such, but the reasonable cost of such moving may be evidence which is illustrative of the damage to the property, measured as of that particular owner; therefore, the cost of such moving should be ascertained and estimated, either when arriving at a value for negotiation, or when determining evidence of a value in condemnation case. 1958-59 Op. Att'y Gen. p. 276.

When area taken for right of way intersects building on tract involved, i.e., a portion of the building lies on land which is taken, and a portion of the building lies on land which is not taken, that portion of the building which extends upon the right of way may be severed if it is practicable to do so without destruction of the building; if severance would result in destruction, then the measure of damage to the building is the building's full value. 1958-59 Op. Att'y Gen. p. 273.

When a condemnation causes the intersection of a building by the line drawn between the land taken and the land not taken, when it is impossible to sever the building and the whole building would be destroyed, the value of the land without the building taken would be charged against the condemnor; the true market value of the remaining portion of the condemnee's land without the building, of course, it being destroyed, would be compared with the value of that tract before taking. 1958-59 Op. Att'y Gen. p. 273.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 1 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, §§ 122 et seq., 178 et seq.

C.J.S. — 25 C.J.S., Damages, § 1 et seq. 29A C.J.S., Eminent Domain, §§ 66 et seq., 250 et seq.

ALR. — Profits derived from business conducted on property taken by eminent domain as evidence of market value, 7 A.L.R. 163.

Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, 9 A.L.R. 634.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like, 9 A.L.R. 842.

Expense of building and maintaining fences as element in the determination of

damages in eminent domain, 10 A.L.R. 451.

Right to interest in condemnation proceedings during owner's retention of possession, 32 A.L.R. 98.

Protection of rights of mortgagee in eminent domain proceedings, 58 A.L.R. 1534; 110 A.L.R. 542; 154 A.L.R. 1110.

Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 A.L.R. 194.

Failure to claim in special assessment proceedings compensation for taking or damaging property in construction of improvements as waiver or estoppel, 64 A.L.R. 764.

Measure of damages or compensation where property is taken to widen street, 64 A.L.R. 1513.

Compensation in eminent domain in respect of fixtures or chattels used in connection with real property taken or damaged, 90 A.L.R. 159.

Elements and measure of compensation for power lines or other wire lines over private property, 124 A.L.R. 407.

Special value or adaptability of property for purpose for which it is taken, as an element of, or matter for consideration in fixing, damages in condemnation proceedings, 124 A.L.R. 910.

Distinction between income or profits from business on land and income or profits from use of land, as affecting admissibility of evidence in that regard on question of damages in eminent domain, 134 A.L.R. 1125.

Increment to value, from project for which land is condemned, as a factor in fixing compensation, 147 A.L.R. 66.

Frustration of contractual rights as basis of claim for compensation where another's real property is taken in exercise of eminent domain, 152 A.L.R. 307.

Price at which one whose land is taken or damaged under power of eminent domain has sold, contracted to sell, or optioned land in question to third person as evidence of its market value in condemnation proceeding or related action for damages, 155 A.L.R. 262.

Are different estates or interests in real property taken under eminent domain to be valued separately, or entire property to be valued as a unit and the amount apportioned among separate interests, 166 A.L.R. 1211.

General governmental policy (distinguished from specific project) as affecting compensation allowable in eminent domain, 167 A.L.R. 502.

Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit, 1 A.L.R.2d 878.

Elements and measure of lessee's compensation for taking or damaging leasehold in eminent domain, 3 A.L.R.2d 286.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Attorney's fees as within statute imposing upon condemner liability for "expenses," "costs," and the like, 26 A.L.R.2d 1295.

Quotient condemnation report or award by commissioners or the like, 39 A.L.R.2d 1208.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 A.L.R.2d 1453.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating to damages or the value of the property condemned, 80 A.L.R.2d 1270.

Bad reputation of condemned property derived from its illegal use for gambling, prostitution, or the like, as factor decreasing compensation or damages, 87 A.L.R.2d 1156.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 A.L.R.2d 772.

Valuation at time of original wrongful entry by condemnor or at time of subsequent initiation of condemnation proceedings, 2 A.L.R.3d 1038.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 A.L.R.3d 901.

Eminent domain: deduction of benefits in determining compensation or damages in proceedings involving opening, widening, or otherwise altering highway, 13 A.L.R.3d 1149.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to

landowner's unwillingness to sell property, 17 A.L.R.3d 1449.

Existence of restrictive covenant as element in fixing value of property condemned, 22 A.L.R.3d 961.

Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway, 42 A.L.R.3d 148.

Measure of damages for condemnation of cemetery lands, 42 A.L.R.3d 1314.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 A.L.R.3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 A.L.R.3d 581.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 A.L.R.3d 488.

Eminent domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 A.L.R.3d 534.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 A.L.R.3d 752.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Assemblage or plottage as factor affecting value in eminent domain proceedings, 8 A.L.R.4th 1202.

Eminent domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold, 17 A.L.R.4th 337.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

Measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable, or noncommercial use, 29 A.L.R.5th 36.

22-2-64. Entry of findings by assessors.

The assessors shall enter their findings on the notice substantially as follows:

> Upon the application of A.B. to condemn the following property or interest of C.D.: _____, notice was duly served by the sheriff (or his deputy) on C.D. (owner, trustee, representative, or judge of the probate court, as the case may be) by (mailing, posting, etc., as the case may be). The applicant appointed E.F. as assessor. The (owner, judge of the probate court, representative, as the case may be) appointed G.H. as assessor, and they two (or judge of the superior court) appointed I.J. as assessor; E.F., G.H., and I.J., after being duly sworn and hearing the evidence, find and award that for taking the property or interest sought to be condemned, to wit: _____, the said A.B. shall pay to C.D., as owner, the sum of $_____. The consequential damages to the property or interest of C.D. not taken amount to $_____, and the consequential benefits to $_____; and the said A.B. shall pay said C.D. the difference between such damage and such benefit.

History. — Ga. L. 1894, p. 95, § 20; Civil Code 1895, § 4676; Civil Code 1910, § 5226; Code 1933, § 36-507.

JUDICIAL DECISIONS

Award by assessors binding until reversed or set aside. — An award by condemnation assessors and the order and judgment of the court directing the filing thereof are judgments rendered by a competent tribunal, and, even if erroneous, are binding upon a condemnee until reversed or set aside, and cannot be collaterally attacked in the condemnee's equitable petition for injunction against the condemnor's contractor. McGreggor v. W.L. Florence Constr. Co., 208 Ga. 176, 65 S.E.2d 809 (1951).

Jury use of form similar to finding of assessors. — When the procedure was proper in submitting to the jury a form similar to the finding of assessors under former Code 1933, §§ 36-504 and 36-507 (see O.C.G.A. §§ 22-2-63 and 22-2-64), and there was no exception to such procedure, the jury, like the appraisers, had the right under § 36-504, if the evidence so authorized, to offset any consequential damages to the "property not taken" with the "consequential benefits," and to find the difference, if any, in favor of the property owner, but to award nothing for such damages if the "consequential benefits" equaled or exceeded the "consequential damages." Nalley Land & Inv. Co. v. State Hwy. Bd., 49 Ga. App. 258, 175 S.E. 269 (1934).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 548 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 389 et seq.

22-2-65. Filing and recording of award.

Within ten days after the award is made, it shall be filed and recorded in the office of the clerk of the superior court of the county where the property or interest is situated.

History. — Ga. L. 1894, p. 95, § 21; Civil Code 1895, § 4677; Civil Code 1910, § 5227; Code 1933, § 36-508.

JUDICIAL DECISIONS

After award of assessors has been made condemnor cannot dismiss condemnation suit. Housing Auth. v. Mercer, 123 Ga. App. 38, 179 S.E.2d 275 (1970).

Award by assessors binding until reversed or set aside. — An award by condemnation assessors and the order and judgment of the court directing the filing thereof are judgments rendered by a competent tribunal, and, even if erroneous, are binding upon a condemnee until reversed or set aside, and cannot be collaterally attacked in the condemnee's equitable petition for injunction against the condemnor's contractor. McGreggor v. W.L. Florence Constr. Co., 208 Ga. 176, 65 S.E.2d 809 (1951).

Filing is not essential to validity but only to enforceability of the award of the assessors. Hodges v. South Ga. Natural Gas Co., 111 Ga. App. 180, 141 S.E.2d 182 (1965).

This section is directory and contains no provision that delay in recordation of the award renders the award in-

valid. Landers v. Georgia Pub. Serv. Comm'n, 217 Ga. 804, 125 S.E.2d 495 (1962).

Cited in State Hwy. Bd. v. Long, 61 Ga. App. 173, 6 S.E.2d 130 (1939); Woodside v. City of Atlanta, 214 Ga. 75, 103 S.E.2d 108 (1958); State Hwy. Dep't v. Wilson, 98 Ga. App. 619, 106 S.E.2d 544 (1958); DOT v. Garrett, 154 Ga. App. 104, 267 S.E.2d 643 (1980).

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 512 et seq.

ALR. — Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 A.L.R.4th 889.

Part 5

Appeals and Final Judgment

JUDICIAL DECISIONS

This chapter concerns appeals from several different forms of condemnation proceedings and is necessarily general in its language. DeKalb County v. Jackson-Atlantic Co., 123 Ga. App. 695, 182 S.E.2d 160 (1971).

Burden of proving value of land and consequential damages on condemnor. — The burden of proof to show the value of the land taken and the consequential damages to the remaining property, if any, is on the condemnor. State Hwy. Dep't v. Smith, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Condemnor chooses its method of procedure, and it is bound by the provisions of law following its own election. The property owner is also bound, although the owner did not choose the method of procedure. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Award of assessors is condition precedent to condemnor's appeal. — An award of compensation by assessors, filed as required by law, is a taking of private property for public use and payment must be made as a condition precedent to the condemnor's right to prosecute an appeal. Arnold v. State Hwy. Dep't, 116 Ga. App. 201, 156 S.E.2d 469 (1967).

Compensation the sole issue for jury on appeal. — In condemnation cases, the sole question for the consideration of the jury, upon an appeal from an award of the assessors or from an award of a special master, is the amount of compensation to be paid to the condemnee for the property taken under the condemnation proceeding and the amount of damages to the remaining property of the condemnee, if any. State Hwy. Dep't v. Smith, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Motion to dismiss appeal in condemnation proceedings under Art. 3 of this chapter, which is regulated by this part, falls in a different category from an oral motion to strike pleadings, amendments, or answers, since the motion to dismiss the appeal raises issues of fact. Murray v. State Hwy. Dep't, 103 Ga. App. 517, 120 S.E.2d 48 (1961).

Ruling on oral motion to strike motion to dismiss. — Trial court, in passing upon an oral motion to strike and dismiss the motion to dismiss an appeal in condemnation proceedings, can consider the evidence. Murray v. State Hwy. Dep't, 103 Ga. App. 517, 120 S.E.2d 48 (1961).

Contesting validity of condemnation proceedings. — When a property owner participates in proceedings but refuses to take the award of the assessors, and when the property owner acted promptly after the award of the assessors was made by filing a petition in equity, alleging that the condemnor was proceeding illegally and had no right to condemn, and sought to enjoin the entering upon or taking possession of the property, the property owner is not estopped from contesting the validity of the condemnation proceedings. Johnston v. Clayton County

Water Auth., 222 Ga. 39, 148 S.E.2d 417 (1966).

Cited in United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960); Russell v. Venable, 216 Ga. 137, 115 S.E.2d 103 (1960); Harwell v. Georgia Power Co., 154 Ga. App. 142, 267 S.E.2d 769 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Date of taking is date of special master's or assessor's award. 1970 Op. Att'y Gen. No. 70-116.

Appraisal to be updated to date of hearing before special master. — When condemnation is necessary, the appraiser should be instructed to update the appraisal to the date of the hearing before the special master; this appraisal should contemplate that the amount of the award will be paid into court by the condemnor within ten days of such hearing by the special master, and this is the amount that the appraiser should be prepared to testify to if and when there is an appeal of the matter to a jury in the superior court by either party thereto. 1970 Op. Att'y Gen. No. 70-116.

RESEARCH REFERENCES

ALR. — Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 A.L.R.2d 724.

Spur track and the like as constituting a use for which railroad can validly exercise right of eminent domain, 35 A.L.R.2d 1326.

Liability for costs on appeal relating to amount of condemnation award, 50 A.L.R.2d 1386.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

Right to open and close argument in trial of condemnation proceedings, 73 A.L.R.2d 613.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 A.L.R.2d 346.

22-2-80. Appeal to jury in superior court generally.

In case either party is dissatisfied with the amount of the assessors' award, he or they may, within ten days from the time the award is filed, enter in writing an appeal from the award to the superior court of the county where the award is filed. At the term succeeding the filing of the appeal, it shall be the duty of the judge to cause an issue to be made and tried by a jury as to the value of the property or interest taken or the amount of damage done, with the same right to move for a new trial and file an appeal as in other cases at law.

History. — Ga. L. 1894, p. 95, § 22; Civil Code 1895, § 4678; Civil Code 1910, § 5228; Code 1933, § 36-601.

JUDICIAL DECISIONS

Legislature intended to concern itself with time after which appeal may not be filed, with no regard to the time when filing is premature, except that of course the award of the assessors must be in existence, and the rights of the parties

fixed, in order that there may be something to appeal from. The filing itself is not essential to the validity but only to the enforceability of the award. Hodges v. South Ga. Natural Gas Co., 111 Ga. App. 180, 141 S.E.2d 182 (1965).

Award of assessors, standing alone, is not judgment of court since the judgment is entered up by the court based on the award, but it is a judgment rendered by a tribunal which is competent to fix the rights and liabilities of the parties to the proceedings with reference to the matters and things involved. It can be amended only by permission of the court. Hodges v. South Ga. Natural Gas Co., 111 Ga. App. 180, 141 S.E.2d 182 (1965).

Procedure provided for is not a suit within the legal meaning of the term. Hodges v. South Ga. Natural Gas Co., 111 Ga. App. 180, 141 S.E.2d 182 (1965).

Time for appealing assessor's award. — Since the Board of Assessors did not file and record their award, apparently on the belief that the parties had decided on their own what the just compensation was for the condemnor obtaining the right of way, the 10-day time period for filing an appeal to a jury from the time the award was filed never arose and the condemnee was not barred from filing an appeal to a jury. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500 (2002).

Appeal entered after ten days from filing of award is properly dismissed. Edwards v. Savannah & S. Ry., 140 Ga. 761, 79 S.E. 841 (1913).

Appeal not filed within the ten-day period is not timely and the proper judgment is one of dismissal. City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Petition for removal of condemnation proceedings must be filed within the time allowed for appeals. City of Toccoa v. Marchbanks, 261 F. 684 (N.D. Ga. 1919).

Appeal may be entered by appellant's attorney. Bibb Brick Co. v. Central of Ga. Ry., 151 Ga. 83, 105 S.E. 833 (1921).

No bond is necessary on appeal. Alderman v. Valdosta, M. &. W.R.R., 9 Ga. App. 526, 71 S.E. 931 (1911); Bibb Brick Co. v. Central of Ga. Ry., 151 Ga. 83, 105 S.E. 833 (1921).

Appeal may be entered by city giving bond to the clerk of superior court. Potts v. City of Atlanta, 140 Ga. 431, 79 S.E. 110 (1913).

Judge's duty to bring issue to trial. — This section places the duty to bring the issue to trial squarely upon the judge; no burden is imposed on either party by the statute to insure that the case is timely tried. Lackey v. DeKalb County, 156 Ga. App. 309, 274 S.E.2d 705 (1980).

See Nodvin v. DeKalb County, 158 Ga. App. 819, 282 S.E.2d 410 (1981).

Appeal is de novo investigation, and the defendant may file an appropriate defense thereto. Central Ga. Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912).

An appeal to the superior court from an award of assessors in a condemnation proceeding is a de novo investigation, if the assessors had jurisdiction over the subject matter and the parties. If the assessors do have such jurisdiction, the appeal will not be dismissed nor the case remanded, though the award be in fact a nullity. Livsey v. Walton County, 47 Ga. App. 211, 170 S.E. 268 (1933).

The appeal from an appraisers' award on condemnation proceedings brings the matter de novo to the jury on matters of value of the property taken and amount of damage done. Tuggle v. De Kalb County, 101 Ga. App. 890, 115 S.E.2d 751 (1960).

An appeal from an award of assessors is a trial de novo on the question of compensation, and it is the function and duty of the jury to pass upon the issues independently of the award of the assessors. Chandler v. Alabama Power Co., 104 Ga. App. 521, 122 S.E.2d 317 (1961), rev'd on other grounds, 217 Ga. 550, 123 S.E.2d 767 (1962).

An appeal by either party entitles both parties to a de novo determination of the issue of the amount of a condemnee's award. Smith v. Georgia Power Co., 131 Ga. App. 380, 205 S.E.2d 916 (1974).

The only method of correcting any errors the assessors or a special master may have made in the original hearing and award is not by recommittal to that body but by an appeal in the superior court, which begins again the process of adjudication. City of Savannah Beach v. Thomp-

son, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Only issue on appeal is amount of compensation to be paid. — The issue on appeal cannot be broadened so as to raise questions other than those as to compensation. Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904); Atlanta Terra Cotta Co. v. Georgia Ry. & Elec. Co., 132 Ga. 537, 64 S.E. 563 (1909).

In condemnation proceedings, the only issue before the assessors or a jury on appeal is the amount of compensation to be paid, and neither the assessors nor a jury can determine whether the condemnor is proceeding legally; the remedy of the landowners is to apply to a court of equity to enjoin the illegal proceedings. Garden Parks v. Fulton County, 88 Ga. App. 97, 76 S.E.2d 31 (1953).

The sole question to be passed upon by the assessors, or a jury in the superior court on appeal, is the amount of compensation to be paid. Whether the quantity of land sought to be taken is necessary and proper for the purpose for which it is sought is a question not involved in such a proceeding. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

As a general rule the only issue before the jury relative to lands taken is its market value at the time of the taking. State Hwy. Dep't v. Howell, 119 Ga. App. 606, 168 S.E.2d 213 (1969).

While all relevant legal and equitable issues may be raised in an appeal from the assessors' award in a condemnation proceeding, the sole issue for the jury is value. All other issues, including the necessary fact finding, are for the determination of the court. DeKalb County v. Jackson-Atlantic Co., 123 Ga. App. 695, 182 S.E.2d 160 (1971).

An appeal to the superior court jury is on the issue of value and damages alone. City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

An appeal from an award of assessors is a trial de novo on the question of compensation, and it is the function and duty of the jury to pass upon the issues independently of the award of the assessors. DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624 (1975).

Form of verdict on appeal from award of appraisers is not prescribed by statute. Nalley Land & Inv. Co. v. State Hwy. Bd., 49 Ga. App. 258, 175 S.E. 269 (1934).

Award of jury shall be in money only, and no conditions can be attached thereto. Darien & W.R.R. v. McKay, 132 Ga. 672, 64 S.E. 785 (1909).

On appeal from the award of assessors in a statutory condemnation proceeding, the verdict should be for a given sum. State Hwy. Bd. v. Warthen, 54 Ga. App. 754, 189 S.E. 76 (1936).

Waiver of irregularities in proceedings. — When the parties agreed to waive irregularities in proceedings to condemn a railroad right of way, these are not open on appeal. Georgia G.R.R. v. Venable, 129 Ga. 341, 58 S.E. 864 (1907).

Interest should be included as part of jury's award, for the jury, in reaching a verdict, should consider separately the various elements in respect to which the jurors hear testimony, and the jury's verdict is properly rendered for one sum. State Hwy. Bd. v. Warthen, 54 Ga. App. 759, 189 S.E. 76 (1936).

Tender or payment of award is necessary before property may be taken or the work thereon commenced. Wilson v. State Hwy. Dep't, 85 Ga. App. 907, 70 S.E.2d 535 (1952).

Payment to court equivalent of payment to owner, not owner's acceptance. — Payment into court is the equivalent of payment to the owner only insofar as the right to enter upon the property and prosecute the work under this section is concerned. It is not the equivalent of acceptance of the award by the owner nor of payment to one insofar as it affects one's right to pursue one's remedy in equity. Williams v. City of La Grange, 213 Ga. 241, 98 S.E.2d 617 (1957).

Procedure substantially the same for appeals from assessors' award and justice's court. — Substantially the same procedure is provided in cases of appeal from an award of assessors in a condemnation proceeding to the superior court as is provided in cases of appeal from a justice's court to the superior court. State Hwy. Bd. v. Long, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

Amendments and readjustments of petitions authorized on appeal. — On the appeal from the award of the appraisers, it is the duty of the judge to cause an issue to be made, and that in itself authorizes amendments and readjustments of the petitions in so far as they do not disturb the actual property involved. Tuggle v. De Kalb County, 101 Ga. App. 890, 115 S.E.2d 751 (1960).

Including amendment of acreage description. — When land to be condemned is accurately described by metes and bounds but the acreage description is not completely accurate, the acreage description may be changed by amendment on appeal of the appraisers' award, and such change is no ground for dismissing the appeal. Tuggle v. De Kalb County, 101 Ga. App. 890, 115 S.E.2d 751 (1960).

Award of assessors is not proper evidence for consideration of jury on an appeal in a condemnation case. Chandler v. Alabama Power Co., 104 Ga. App. 521, 122 S.E.2d 317 (1961), rev'd on other grounds, 217 Ga. 550, 123 S.E.2d 767 (1962); DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624 (1975).

Except for purpose of impeaching appraiser's testimony. — The award of the assessors may be admitted for the limited purpose of impeaching the testimony of one of the appraisers. DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624 (1975).

Withdrawal of appeal not allowed without consent of adverse party. — When an appeal is taken from an award of assessors to the superior court, the condemnor shall not be allowed to withdraw an appeal after the appeal shall be entered, but by the consent of the adverse party. State Hwy. Bd. v. Long, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

Ga. L. 1957, p. 387, § 14 (see O.C.G.A. § 22-2-112) was copied verbatim from former Code 1933, § 36-601 (see O.C.G.A. § 22-2-80) and consequently had the same meaning. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Ga. L. 1957, p. 387, § 14 (see O.C.G.A. § 22-2-112) dealing with an appeal from the award of the special master, and former Code 1933, § 36-601 (see O.C.G.A. § 22-2-80) dealing with appeals from awards of assessors in eminent domain cases, were in identical language and must be given the same meaning. City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Appeal from award of arbitrators governed by the Civil Practice Act. — Notwithstanding a provision in an agreement submitting issues to arbitration under the Civil Practice Act, that the arbitrators should proceed "as in condemnation proceedings," and providing for an "appeal" from the award to the superior court, the award of the arbitrators was a statutory award, to be governed by the Civil Practice Act. Georgia Power Co. v. Friar, 47 Ga. App. 675, 171 S.E. 210 (1933), aff'd, 179 Ga. 470, 175 S.E. 807 (1934).

Condemnee should be allowed to show rental income from property, not for the purpose of being compensated for lost future revenue, but for the purpose of showing the use and location as affecting the value of the property. DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624 (1975).

When jury tries case upon appeals of both condemnor and condemnee, the trial is valid and binding, assuming that the appeal of the condemnor is invalid and alone would not give the court jurisdiction. Liberson v. City of Atlanta, 98 Ga. App. 255, 105 S.E.2d 376 (1958).

Liability for interest on difference between assessors' award and final judgment. — When the amount of the final judgment is less than the award made by the assessors, the condemnee is not liable for the payment of interest on the difference in the amount of the award and the judgment except from the date of the judgment. City of Atlanta v. Lunsford, 105 Ga. App. 247, 124 S.E.2d 493 (1962).

When tenth day following assessor's award falls on Saturday and condemnee files appeal two days thereafter, the entry of a judgment on an assessor's award only two days after the award was filed is premature. McAllister v. City of Jonesboro, 151 Ga. App. 260, 259 S.E.2d 666 (1979).

In appeal from assessment after land has been condemned to establish new road which alters an existing

road, the burden is upon the property owner, in order to establish any consequential damage which may have been sustained by the owner from a discontinuance of the old road, to show that the old road has been discontinued in the manner prescribed by law. Wellmaker v. Lamar County Advisory Bd., 43 Ga. App. 816, 160 S.E. 708 (1931).

Cited in Savannah, Fla. & W. Ry. v. Postal Telegraph-Cable Co., 112 Ga. 941, 38 S.E. 353 (1901); Denham v. State Hwy. Bd., 52 Ga. App. 790, 184 S.E. 631 (1936); Stewart v. Board of Comm'rs, 66 Ga. App. 108, 17 S.E.2d 203 (1941); United States v. 340 Acres of Land, 54 F. Supp. 457 (S.D. Ga. 1944); State Hwy. Dep't v. Peavy, 77 Ga. App. 308, 48 S.E.2d 478 (1948); Hagans v. Excelsior Elec. Membership Corp., 207 Ga. 53, 60 S.E.2d 162 (1950); Wilson v. State Hwy. Dep't, 85 Ga. App. 907, 70 S.E.2d 535 (1952); Olliff v. Housing Auth., 89 Ga. App. 43, 78 S.E.2d 549 (1953); Murray v. State Hwy. Dep't, 103 Ga. App. 517, 120 S.E.2d 48 (1961); State Hwy. Dep't v. Hester, 112 Ga. App. 51, 143 S.E.2d 658 (1965); Adams v. Housing Auth., 117 Ga. App. 646, 161 S.E.2d 444 (1968); Hinton v. Georgia Power Co., 126 Ga. App. 416, 190 S.E.2d 811 (1972); Taylor v. Georgia Power Co., 129 Ga. App. 89, 198 S.E.2d 701 (1973); James v. Housing Auth., 233 Ga. 447, 211 S.E.2d 738 (1975); Martha K. Wayt Trust v. City of Cumming, 306 Ga. App. 790, 702 S.E.2d 915 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appellate Review, § 189. 27 Am. Jur. 2d, Eminent Domain, § 573 et seq.

ALR. — Provision for taking or retaining possession pending appeal in condemnation proceeding, 55 A.L.R. 201.

Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 A.L.R. 194.

Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

How to obtain jury trial in eminent domain: waiver, 12 A.L.R.3d 7.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

22-2-81. Effect of appeal on condemnor's right to use condemned property or interest; payment, tender, or deposit of award as condition on condemnor's right to use property or interest.

The entering of an appeal and the proceedings thereon shall not hinder or delay in any way the condemnor's right to use the condemned property or interest, provided that the condemnor pays or tenders to the owner the amount of the award and, in case of the refusal of the owner to accept the award, deposits the amount awarded with the clerk of the superior court for the benefit of the owner.

History. — Ga. L. 1894, p. 95, § 23; Civil Code 1895, § 4679; Civil Code 1910, § 5229; Code 1933, § 36-602.

Law reviews. — For comment on Georgia Power Co. v. Fountain, 207 Ga. 361, 61 S.E.2d 454 (1950), see 13 Ga. B.J. 341 (1951).

JUDICIAL DECISIONS

Award by assessors binding until reversed or set aside. — An award by condemnation assessors and the order and judgment of the court directing the filing thereof are judgments rendered by a competent tribunal, and, even if erroneous, are binding upon a condemnee until reversed or set aside, and cannot be collaterally attacked in the condemnee's equitable petition for injunction against the condemnor's contractor. McGreggor v. W.L. Florence Constr. Co., 208 Ga. 176, 65 S.E.2d 809 (1951).

Cited in Central Ga. Power Co. v. Stone, 142 Ga. 662, 83 S.E. 524 (1914); Gaston v. Shunk Plow Co., 161 Ga. 287, 130 S.E. 580 (1925); Georgia Power Co. v. Fountain, 207 Ga. 361, 61 S.E.2d 454 (1950); Olliff v. Housing Auth., 89 Ga. App. 43, 78 S.E.2d 549 (1953); Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961); Robinson v. Transcontinental Gas Pipe Line Corp., 306 F. Supp. 201 (N.D. Ga. 1969); Georgia Dep't of Transp. v. Woodward, 254 Ga. 587, 331 S.E.2d 557 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 573 et seq.

ALR. — Eminent domain: payment or deposit of award in court as affecting condemnor's right to appeal, 40 A.L.R.3d 203.

22-2-82. Effect of tender, payment, or acceptance of assessors' award on right of appeal; effect of discrepancy between award and final judgment.

The tender, payment, or acceptance of the award shall not prevent either party from prosecuting the appeal. If the amount awarded by the assessors is less than that found by the final judgment, the person seeking condemnation shall be bound to pay the sum so finally adjudged in order to retain the property or interest. If the amount of the final judgment is less than that awarded by the assessors, the owner shall be bound to refund any excess paid to or received by him; and a judgment for such excess shall be rendered against him to be collected by levy as in other cases.

History. — Ga. L. 1894, p. 95, § 24; Civil Code 1895, § 4680; Civil Code 1910, § 5230; Code 1933, § 36-603.

JUDICIAL DECISIONS

Payment of amount of jury verdict is condition precedent to appeal. — Under the mandate of the Constitution, that private property cannot be taken or damaged for public use without first paying just and adequate compensation to the owner, the payment of the amount of a jury verdict in excess of the prior appraisal by assessors, or special master, is a condition precedent to a valid appeal from such verdict and the judgment based thereon. City of Atlanta v. Wright, 159 Ga. App. 809, 285 S.E.2d 250 (1981).

Tender of award did not impact

right to jury. — Although the condemnor tendered compensation into the trial court's registry that appeared to represent the sum the condemnor and condemnee had agreed was sufficient compensation, the tender of the award did not affect the condemnee's right to appeal to a jury. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500 (2002).

Prayer seeking to enjoin appeal cannot be maintained when the plaintiff has an available remedy at law. Bibb Brick Co. v. Central of Ga. Ry., 150 Ga. 65, 102 S.E. 521 (1920).

Effect of amendment on appeal alleging tender. — An amendment on appeal, alleging tender and acceptance of an assessment operates as a waiver of any irregularity in the notice and assessment. Georgia G.R.R. v. Venable, 129 Ga. 341, 58 S.E. 864 (1907).

Liability for interest on difference between assessors' award and final judgment. — When the amount of the final judgment is less than the award made by the assessors, the condemnee is not liable for the payment of interest on the difference in the amount of the award and the judgment except from the date of the judgment. City of Atlanta v. Lunsford, 105 Ga. App. 247, 124 S.E.2d 493 (1962).

Interest on award withdrawn by condemnee held improper. — When the condemnor paid into the registry of the court the sum awarded to the condemnee by the appointed assessors, and the court paid the sum to the condemnee, the condemnor appealed from the assessors' award, and the court entered judgment for the condemnor for the difference between the assessors' award and the jury's verdict, the award of interest at seven percent per annum from the date the condemnee withdrew the award from the court was improper. Fletcher v. State Hwy. Dep't, 105 Ga. App. 251, 124 S.E.2d 755 (1962).

Error in instruction on computation of interest cured. — While the court erred in instructing the jury that interest should be computed from the date of the award, as the amount of the award of the assessors was paid, and the interest on the difference between the amount of the verdict and the amount tendered should have been computed from the date of the tender, and not from the date of the award, the error was fully cured and rendered harmless to the plaintiff by the defendants writing off all possible interest that the jury could have computed on the damages awarded by them, in excess of the amount of the original award, from the date of that award to the date of the verdict. State Hwy. Bd. v. Warthen, 54 Ga. App. 759, 189 S.E. 76 (1936).

Jury verdict larger than assessor's award. — See Atlanta, B. & Atl. R.R. v. Smith, 132 Ga. 725, 64 S.E. 1073 (1909).

Cited in Atlanta Terra Cotta Co. v. Georgia Ry. & Elec. Co., 132 Ga. 537, 64 S.E. 563 (1909); Central of Ga. Power Co. v. Stone, 142 Ga. 662, 83 S.E. 524 (1914); Wilson v. State Hwy. Dep't, 85 Ga. App. 907, 70 S.E.2d 535 (1952); First Nat'l Bank v. State Hwy. Dep't, 219 Ga. 144, 132 S.E.2d 263 (1963); Sadtler v. City of Atlanta, 236 Ga. 396, 223 S.E.2d 819 (1976); Hendley v. Housing Auth., 160 Ga. App. 221, 286 S.E.2d 463 (1981); Georgia Dep't of Transp. v. Woodard, 254 Ga. 587, 331 S.E.2d 557 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appellate Review, § 75 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 613.

ALR. — Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 A.L.R. 194.

Condemnor's right, as against condemnee, to interest on excessive money deposited in court or paid to condemnee, 99 A.L.R.2d 886.

Eminent domain: payment or deposit of award in court as affecting condemnor's right to appeal, 40 A.L.R.3d 203.

22-2-83. Issuance of execution on award or judgment.

If the condemnor fails to pay the amount of the award or judgment within ten days after the same is filed or entered, then the clerk shall issue execution upon such award or judgment which may be levied upon any property of the condemnor.

History. — Ga. L. 1894, p. 95, § 25; Civil Code 1895, § 4681; Civil Code 1910, § 5231; Code 1933, § 36-604.

JUDICIAL DECISIONS

Condemnee entitled to file award and have execution issued. — A condemnee was under the provisions of this section entitled, when the condemnor's appeal was dismissed, to file the award of the appraisers in the clerk of the superior court's office and have an execution issued on it. Towler v. State Hwy. Dep't, 100 Ga. App. 374, 111 S.E.2d 154 (1959).

This section does not treat award and final judgment as same thing. Georgia Power Co. v. Selman, 87 Ga. App. 323, 73 S.E.2d 597 (1952).

Execution of award may not be arrested by affidavit of illegality. — Since the award of appraisers in a condemnation proceeding is not a judgment of a court, an execution issued thereon may not be arrested by an affidavit of illegality. Georgia Power Co. v. Selman, 87 Ga. App. 323, 73 S.E.2d 597 (1952).

Effect of subsequent independent suit by condemnee on appraisers' award. — The filing of a suit by a condemnee independently of condemnation proceedings and subsequently to the award of the appraisers, in which latter case the condemnee sought to obtain a general judgment for damages, did not affect the right of the condemnee to proceed to have an execution issued on the award in the manner prescribed by this section. The award could, according to former Code 1933, §§ 3-607, 3-608 (see O.C.G.A. § 9-2-44(a)), have been pled to the subsequent damage suit, since the obtaining of the valid award of the appraisers, which award was in the nature of a judgment, prevented a further suit on the same cause of action, except such proceeding as was necessary to enforce the award. The award and the proceedings to enforce it were exhaustive of the condemnee's rights in the premises, and no legal judgment could have been rendered in the proceedings. Towler v. State Hwy. Dep't, 100 Ga. App. 374, 111 S.E.2d 154 (1959).

Cited in Georgia Dep't of Transp. v. Woodard, 254 Ga. 587, 331 S.E.2d 557 (1985).

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 512 et seq.

22-2-84. Entry of notice and award on minutes of court; payment of costs.

In all cases, the clerk shall enter the notice and award thereon upon the minutes of the court, and the condemnor shall pay:

(1) The assessors' costs as provided in Code Section 22-2-40; and

(2) Other costs as provided by law in civil cases in the superior court.

The condemnee shall pay the assessors' costs as provided in Code Section 22-2-40.

History. — Ga. L. 1894, p. 95, § 26; Civil Code 1895, § 4682; Civil Code 1910, § 5232; Code 1933, § 36-605; Ga. L. 1949, p. 1404, § 1; Ga. L. 1955, p. 651, §§ 1, 2; Ga. L. 1992, p. 1688, § 1; Ga. L. 1998, p. 1539, § 2.

Law reviews. — For review of 1998 legislation relating to eminent domain, see 15 Ga. St. U.L. Rev. 115 (1998).

JUDICIAL DECISIONS

Requirement of payment of costs is for benefit of officers of court and not a condition precedent to the filing of an appeal. Hilderbrand v. Housing Auth., 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Clerk is not bound to receive appeal until costs have been paid to the clerk, but if the clerk does receive an appeal without exacting the costs, the appeal is good, and the clerk becomes estopped from saying that the costs have not been paid to the clerk — estopped as to all persons, at least, except the appellant. Hilderbrand v. Housing Auth., 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Failure of condemnor to pay costs and fees within 10 days after judgment does not vitiate its appeal therefrom regardless of whether or not it is a political subdivision of the state. Hilderbrand v. Housing Auth., 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Waiver of right to have costs paid in advance. — When a magistrate refuses to dismiss an appeal because costs have not been paid by the appellant, this amounts to a waiver of the appellant's right to have the costs paid in advance, and the appellee has no right to complain of the refusal to dismiss the appeal. Hilderbrand v. Housing Auth., 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Cited in Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959); Murray v. State Hwy. Dep't, 103 Ga. App. 517, 120 S.E.2d 48 (1961).

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 550 et seq.

ALR. — Liability for costs in trial tribunal in eminent domain proceedings as affected by offer or tender by condemnor, 70 A.L.R.2d 804.

22-2-84.1. Appeals to superior court from assessor's award; reasonable expenses; liability of costs relating to issues of law.

Repealed by Ga. L. 2006, p. 39, § 6/HB 1313, effective April 4, 2006.

Editor's notes. — This Code section was based on Code 1981, § 22-2-84.1, enacted by Ga. L. 1998, p. 1539, § 2.

22-2-85. Extent of interest obtainable by condemnor upon condemnation.

Upon the payment by the condemnor of the amount of the award, or the amount of the final judgment if there is an appeal, the condemnor shall become vested with such interest in the property taken as may be necessary to enable the condemnor to exercise his franchise or conduct his business. Whenever the condemnor ceases using the property taken for the purpose of conducting his business, the property shall revert to the person from whom taken, his heirs or assigns. Notwithstanding any other provision of this Code section, whenever any municipality condemns land for protection against floods and freshets, that municipality may acquire a fee simple title to the property condemned on payment of the condemnation money. When such municipality has a population of more than 250,000 according to the last or any future decennial census of the United States, such municipality, or the county in which the major portion of such municipality is located, shall acquire a fee simple title to the property condemned upon payment of the condemnation money.

History. — Ga. L. 1894, p. 95, § 27; Civil Code 1895, § 4683; Civil Code 1910, § 5233; Ga. L. 1914, p. 61; Code 1933, § 36-606; Ga. L. 1945, p. 690, § 1; Ga. L. 1975, p. 1148, § 1.

Cross references. — Vesting of fee simple title in municipal or county housing authority upon exercise of power of eminent domain, § 8-3-10.

Law reviews. — For annual survey of zoning and land use law, see 57 Mercer L. Rev. 447 (2005). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

Use of condemned property. — The appropriation to public use amounts to a withdrawal only from such private uses as will interfere with the public use. Private use is of course to be subordinated to the public use, but, when the fee remains in the owner, the owner is entitled to make any use of the property which is not inconsistent with its use for the purpose for which it was taken. H.G. Hastings Co. v. Southern Natural Gas Corp., 45 Ga. App. 774, 166 S.E. 56 (1932).

A power company that acquired an electric transmission line easement by condemnation in 1985 had not permanently ceased using the land under O.C.G.A. § 22-2-85; thus, the landowner from whom the land was acquired was not entitled to recover possession of the land. Although the company had not constructed a line across the property, the company maintained the property and planned to construct the line in question after 2010 and before 2020 to meet increased power demands. William E. Honey Bus. Interest, LLLP v. Ga. Power Co., 291 Ga. App. 44, 661 S.E.2d 203 (2008), cert. denied, No. S08C1408, 2008 Ga. LEXIS 678 (Ga. 2008).

Applicability. — Since the original condemnor acquired part of a 50-foot easement by grant and part by condemnation, O.C.G.A. § 22-2-85 was inapplicable in a condemnation action brought by the condemnor's licensee to change the use of the easement from a petroleum pipeline to a fiber optic communications system; even if O.C.G.A. § 22-2-85 were applicable, it was not shown that the condemnor had ceased using the pipeline for the purpose of conducting its business. Witcher v.

Level 3 Communs., LLC, 272 Ga. App. 611, 612 S.E.2d 816 (2005).

Condemned property reverts to owner if purpose permanently ceases. — The clause in this section relating to the reverter of the condemned use means that if the use of the condemned property in the business to be served permanently ceases, the property is not to be used for other purposes, but the easement ceases or reverts to the then owners of the servient land. Florida Blue Ridge Corp. v. Tennessee Elec. Power Co., 106 F.2d 913 (5th Cir. 1939), cert. denied, 309 U.S. 666, 60 S. Ct. 591, 84 L. Ed. 1013 (1940).

When a street railway condemned land for a trolley, it acquired an easement, not fee simple title. Therefore, the railway's interest reverted to the owner, the owner's heirs and assigns, when the land was no longer used as a trolley line. Cobb County v. Crew, 267 Ga. 525, 481 S.E.2d 806 (1997).

Although no deed need be executed, it will control if one is given. City of Atlanta v. Jones, 135 Ga. 376, 69 S.E. 571 (1910).

Term "right of way" as used in former Civil Code 1910, § 5207 (see O.C.G.A. § 22-1-6) was limited by former Civil Code 1910, § 5233 (see O.C.G.A. § 22-2-85), so that it was descriptive of the tenure only. A county may construct a highway thereon. Atlanta, B. & Atl. Ry. v. County of Coffee, 152 Ga. 432, 110 S.E. 214 (1921). See also Georgia G.R.R. v. Venable, 129 Ga. 341, 58 S.E. 864 (1907).

Condemnation of land abutting street. — The property of a land owner abutting a street may be condemned, although the owner's interest in that street is not. Bridwell v. Gate City Term. Co., 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907).

When corporation acquires right to use property by condemnation, the condemnation does not vest in the condemnor only a personal right of use during the life or ownership of the condemnor, but vests the interest condemned in the condemnor just as though it had been conveyed to it. Florida Blue Ridge Corp. v. Tennessee Elec. Power Co., 106 F.2d 913 (5th Cir. 1939), cert. denied, 309 U.S. 666, 60 S. Ct. 591, 84 L. Ed. 1013 (1940).

When business is transferred to another who continues to use condemned property as before, the condemnor is still using it through the transferee, even though one die, or be dissolved if a corporation and the right to the use of the property acquired through condemnation does not cease. Florida Blue Ridge Corp. v. Tennessee Elec. Power Co., 106 F.2d 913 (5th Cir. 1939), cert. denied, 309 U.S. 666, 60 S. Ct. 591, 84 L. Ed. 1013 (1940).

Cited in Central of Ga. Ry. v. Lawley, 33 Ga. App. 375, 126 S.E. 273 (1925); State Hwy. Dep't v. H.G. Hastings Co., 187 Ga. 204, 199 S.E. 793 (1938); State Hwy. Dep't v. Peavy, 204 Ga. 99, 48 S.E.2d 726 (1948); Taylor v. Georgia Power Co., 129 Ga. App. 89, 198 S.E.2d 701 (1973); DOT v. Garrett, 154 Ga. App. 104, 267 S.E.2d 643 (1980); Georgia Dep't of Transp. v. Woodard, 254 Ga. 587, 331 S.E.2d 557 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 771 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 5 et seq., 623 et seq.

ALR. — Reversion of title upon abandonment or vacation of public street or highway, 18 A.L.R. 1008; 70 A.L.R. 564.

Right to interest in condemnation proceedings during owner's retention of possession, 32 A.L.R. 98.

Provision for taking or retaining possession pending appeal in condemnation proceeding, 55 A.L.R. 201.

Title of interest acquired by railroad in exercise of eminent domain as fee or easement, 155 A.L.R. 381.

Condemnation, proceeding therefor, or prospect thereof, as affecting marketability of title, 21 A.L.R.2d 792.

Who, as between condemnor and condemnee, bears risk of loss or destruction of property occurring after commencement but before completion of eminent domain proceedings, 89 A.L.R.2d 1076.

Right to condemn property in excess of

needs for a particular public purpose, 6 A.L.R.3d 297.

22-2-86. Manner of payment where owner a minor or under disability and without a legal representative.

If the person entitled to payment of the award or judgment is a minor or under any disability and has no legal representative entitled to receive the money, the money shall be paid to the judge of the probate court of the county, who shall at once cause the money to be invested. To this end, the judge of the probate court of the county of the disabled owner's residence shall appoint a guardian or other proper representative to receive the money and manage the property in which it may be invested.

History. — Ga. L. 1894, p. 95, § 28; Civil Code 1895, § 4684; Civil Code 1910, § 5234; Code 1933, § 36-607.

RESEARCH REFERENCES

ALR. — Personal liability of purchaser of property subject to chattel mortgage, to the mortgagee, 100 A.L.R. 1038.

ARTICLE 2

PROCEEDING BEFORE SPECIAL MASTER

Cross references. — Succession by auditors to duties previously performed by masters in superior courts of state, § 9-7-1.

Law reviews. — For article, "Condemning Local Government Condemnation," see 39 Mercer L. Rev. 11 (1987).

JUDICIAL DECISIONS

Article does not violate state Constitution. — Ga. L. 1957, p. 387, § 1 et seq., which provides procedures for the condemnation of private property for public use by the state and other political entities, does not as a whole violate the prohibition against taking land for public purposes without just compensation as the law provides an adequate method for determining the value of property sought to be taken and for just and adequate compensation to be first paid. O.K., Inc. v. State Hwy. Dep't, 213 Ga. 666, 100 S.E.2d 906 (1957).

Condemnee is not deprived of due process and equal protection of the laws. Collins v. Metropolitan Atlanta Rapid Transit Auth., 163 Ga. App. 168, 291 S.E.2d 742 (1982).

Ga. L. 1957, p. 387, § 1 et seq. meets due process requirements in that the law gives the condemnee notice as well as reasonable opportunity for preparation and for a hearing. Due process requirements are satisfied if one has a reasonable notice and opportunity to be heard, and to present one's claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. Brown v. Georgia Power Co., 134 Ga. App. 784, 216 S.E.2d 613 (1975).

Due process requirements are satisfied by Ga. L. 1957, p. 387, § 1 et seq. in that the law gives the condemnee notice as well as an opportunity for a hearing. Sweat v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384 (1975).

Legislature has provided adequate method for determining compensation. — The legislature, by enacting Ga. L. 1957, p. 387, §§ 5, 11, and 14 (see O.C.G.A. §§ 22-2-102, 22-2-108, and 22-2-112), has provided an adequate method for determining the just and adequate compensation of property sought to be condemned, and Ga. L. 1957, p. 387, § 12 (see O.C.G.A. § 22-2-110) of the act in no wise limits the master to an arbitrary finding. Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959).

Constitutional guarantee of trial by jury does not extend to eminent domain proceedings. Sweat v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384 (1975).

Purpose of Ga. L. 1957, p. 387, § 1 et seq. is to provide for speedy ascertainment of just and adequate compensation under the supervision of the superior court, and in such a role the special master is simply an extension of the court, appointed by it as a semi-judicial assistant. West End Whses., Inc. v. Dunlap, 141 Ga. App. 333, 233 S.E.2d 284 (1977).

The purpose of Ga. L. 1957, p. 387, § 1 et seq. is to provide a simpler and more effective method of condemnation when there is a necessity for a quick determination or when, for several reasons, a judicial supervision is desirable. Fountain v. Marta, 147 Ga. App. 465, 249 S.E.2d 296 (1978).

Ga. L. 1957, p. 387, § 1 et seq. provides cumulative and summary method for condemnation of property. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

The 1967 amendment to O.C.G.A. § 22-2-100 et seq. should be construed as evidencing legislative intent that special master proceeding be considered a "supplementary" and "cumulative" form of condemnation in all cases wherein condemnor otherwise possesses power of eminent domain. Mallory v. Upson County Bd. of Educ., 163 Ga. App. 377, 294 S.E.2d 599 (1982).

Law attempts to achieve more perfect conciliation between parties by providing for the use of experienced, competent attorneys as special masters. Brown v. Georgia Power Co., 371 F. Supp. 543 (S.D. Ga. 1973), aff'd, 491 F.2d 117 (5th Cir.), cert. denied, 419 U.S. 838, 95 S. Ct. 66, 42 L. Ed. 2d 65 (1974).

Special master's rulings may be excepted to by trial court and disposed of in like manner before any award, which is the end product of the proceeding, is offered to the court and a judgment of taking is entered up based on the award. Brown v. Georgia Power Co., 371 F. Supp. 543 (S.D. Ga. 1973), aff'd, 491 F.2d 117 (5th Cir.), cert. denied, 419 U.S. 838, 95 S. Ct. 66, 42 L. Ed. 2d 65 (1974).

Ga. L. 1957, p. 387, § 1 (see O.C.G.A. § 22-2-100 et seq.) is not controlled by Civil Practice Act, (see O.C.G.A. § 9-11-1 et seq.) but is a special statutory proceeding. Roberts v. Wise, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

Special master procedure is in rem proceeding which contains no requirement of negotiation. Harwell v. Georgia Power Co., 154 Ga. App. 142, 267 S.E.2d 769, aff'd, 246 Ga. 203, 269 S.E.2d 464 (1980).

Procedure not available for taking property previously dedicated to public use. — In absence of express authority, the condemning procedure authorized by Ga. L. 1957, p. 387, § 1 et seq. is not available for use by condemnors who seek to take property previously dedicated to a public use. Georgia S. & Fla. Ry. v. City of Warner Robins, 107 Ga. App. 370, 130 S.E.2d 151 (1963).

Condemnor chooses its method of procedure, and it is bound by the provisions of law following its own election. The property owner is also bound, although the owner did not choose the method of procedure. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

If the condemnor elects to use the Special Master Law, then it is bound by the provisions of law following its own election. Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817, cert. denied, 186 Ga. App. 919, 367 S.E.2d 817 (1988).

Condemnor has no rights except those expressly granted to it by stat-

ute, and those rights can be exercised only when every prerequisite to their exercise has been fully met. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Large discretion is vested in condemnor in selection of property to be condemned, and such selection should not be interfered with or controlled by the courts, unless made in bad faith, or capriciously or wantonly injurious, or in some respect beyond the privilege conferred by statute or its charter. Miles v. Brown, 223 Ga. 557, 156 S.E.2d 898 (1967).

Amendment of petition for condemnation. — Petition for condemnation can be amended by condemnor to make a more specific description of right of way to be condemned. Dorsey v. DOT, 248 Ga. 34, 279 S.E.2d 707 (1981).

Proceeding by county board of education. — Superior court did not err in holding that condemnor county board of education was authorized to proceed under O.C.G.A. § 22-2-100 et seq. in exercising power of eminent domain. Mallory v. Upson County Bd. of Educ., 163 Ga. App. 377, 294 S.E.2d 599 (1982).

Determination of necessity of taking and of rights of condemnee. — Ga. L. 1957, p. 387, § 1 et seq. vests a broad discretion in the condemning authority as to the necessity for the taking and provides that other matters material to the rights of the condemnee generally will be determined under proper pleadings in the pending condemnation proceedings. Miles v. Brown, 223 Ga. 557, 156 S.E.2d 898 (1967).

Private company possessing power of eminent domain is authorized to employ condemnation procedure of Ga. L. 1957, p. 387, § 1 et seq. Nodvin v. Georgia Power Co., 125 Ga. App. 821, 189 S.E.2d 118 (1972).

State-created entity not authorized to condemn for public purposes. — When the condemnor is not the state, or a part of the state or an agency of the state but a creature created by the state, the condemnor is not authorized to condemn property in its own name for public purposes. Scarlett v. Georgia Ports Auth., 223 Ga. 417, 156 S.E.2d 77 (1967).

Condemnor may take and use property after required preliminary procedures. — Under Ga. L. 1957, p. 387, § 1 et seq., the condemning body, after the required preliminary procedures, may take the property, use the property, and proceed to change the property to a degree that irrevocable harm could be done before the issue of incompatible use is determined. Georgia S. & Fla. Ry. v. City of Warner Robins, 107 Ga. App. 370, 130 S.E.2d 151 (1963).

Statutory construction when procedural provisions incomplete. — When wording is taken from a prior statute, or when Ga. L. 1957, p. 387, § 1 et seq. fails to be complete within itself, then reference to provisions for proceedings before assessors is permitted to fill in the void. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Property owner not entitled to hearing on necessity of taking. — The necessity or expediency of taking property for public use is a legislative question upon which the owner is not entitled to a hearing under U.S. Const., amend. 14 and Ga. Const. 1976, Art. I, Sec. I, Para. I (see Ga. Const. 1983, Art. I, Sec. I, Para I). Miles v. Brown, 223 Ga. 557, 156 S.E.2d 898 (1967).

Owner cannot defeat condemnation proceeding by injunction petition. — The owner of private property cannot, by petition for injunction, defeat a condemnation proceeding or litigate the issue that the property sought to be condemned is being condemned for private rather than public purposes; such issue must be litigated in the condemnation proceeding. Reeves v. City of Atlanta, 216 Ga. 592, 118 S.E.2d 378 (1961).

Owner of land cannot prevent condemnation because there is other property which might be suitable for purpose. Miles v. Brown, 223 Ga. 557, 156 S.E.2d 898 (1967).

Burden of proving value of land and consequential damages on condemnor. — The burden of proof to show the value of the land taken and the consequential damages to the remaining property, if any, is on the condemnor. State Hwy. Dep't v. Smith, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Weight of evidence of property value before and after condemnation.

— Evidence of the difference between the value of the whole property (that taken and that not taken) before a taking and after the taking is without probative value as to the actual value of the land taken and the consequential damage to that not taken. State Hwy. Dep't v. Mann, 110 Ga. App. 390, 138 S.E.2d 610 (1964).

Exceptions to findings of special master. — When legal objections are raised before and passed upon by the special master, to obtain review of these objections exceptions must be taken to the master's findings prior to the superior court's entry of an order and judgment condemning the property; additionally, if either party is dissatisfied with the master's award as regards value, they may, within ten days from the time the award is filed, enter in writing an appeal from the award to the superior court and it shall be the duty of the judge to cause an issue to be made and tried by a jury. Parlato v. City of Atlanta, 151 Ga. App. 235, 259 S.E.2d 217 (1979).

Ga. L. 1957, p. 387, § 1 et seq. limits appeal to question of value only, and provides that all other issues including the right to condemn, the interest condemned, and everything else preliminary to the actual vesting of title should be decided at the first hearing. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961); Brown v. Georgia Power Co., 371 F. Supp. 543 (S.D. Ga. 1973), aff'd, 491 F.2d 117 (5th Cir.), cert. denied, 419 U.S. 838, 95 S. Ct. 66, 42 L. Ed. 2d 65 (1974).

In condemnation cases, the sole question for the consideration of the jury, upon an appeal from an award of the assessors or from an award of a special master, is the amount of compensation to be paid to the condemnee for the property taken under the condemnation proceeding and the amount of damages to the remaining property of the condemnee, if any. State Hwy. Dep't v. Smith, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Appellate review of question of what property interest is taken in a condemnation under the special master procedure is allowed when properly raised and preserved. Harwell v. Georgia Power Co., 154 Ga. App. 142, 267 S.E.2d 769, aff'd, 246 Ga. 203, 269 S.E.2d 464 (1980).

Action for recovery of damages resulting from condemnor's negligence is not proper in condemnation proceedings. Georgia Power Co. v. Jones, 122 Ga. App. 614, 178 S.E.2d 265 (1970).

There is no law permitting recovery of damages to personalty as such on appeal of a finding by the special master fixing value of real property alone. State Hwy. Dep't v. Mann, 110 Ga. App. 390, 138 S.E.2d 610 (1964).

Cited in Anthony v. State Hwy. Dep't, 215 Ga. 853, 113 S.E.2d 768 (1960); Fulton County v. Aronson, 216 Ga. 497, 117 S.E.2d 166 (1960); State Hwy. Dep't v. Smith, 219 Ga. 800, 136 S.E.2d 334 (1964); State Hwy. Dep't v. Respess, 111 Ga. App. 421, 142 S.E.2d 73 (1965); Avary v. City of Atlanta, 221 Ga. 76, 143 S.E.2d 183 (1965); Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 884 (1966); Donehoo v. Fulton County, 116 Ga. App. 368, 157 S.E.2d 323 (1967); City of Atlanta v. Airways Parking Co., 225 Ga. 173, 167 S.E.2d 145 (1969); State Hwy. Dep't v. Howard, 119 Ga. App. 298, 167 S.E.2d 177 (1969); Phillips v. Georgia Power Co., 225 Ga. 289, 168 S.E.2d 150 (1969); Jones v. Georgia Power Co., 225 Ga. 510, 169 S.E.2d 810 (1969); DeKalb County v. Jackson-Atlantic Co., 123 Ga. App. 695, 182 S.E.2d 160 (1971); White v. Georgia Power Co., 237 Ga. 341, 227 S.E.2d 385 (1976); City of Atlanta v. First Nat'l Bank, 154 Ga. App. 658, 269 S.E.2d 878 (1980); White v. Georgia Power Co., 247 Ga. 256, 274 S.E.2d 565 (1981); Craven v. Georgia Power Co., 248 Ga. 79, 281 S.E.2d 568 (1981); Dougherty County v. Burt, 168 Ga. App. 166, 308 S.E.2d 395 (1983); White v. Ringgold Tel. Co., 334 Ga. App. 325, 779 S.E.2d 378 (2015).

OPINIONS OF THE ATTORNEY GENERAL

It is responsibility of special master to establish value of property condemned, and nothing more; one's duty is to assess the value of the property taken or damaged, and also to assess the consequential damages and benefits to the

property not taken. 1969 Op. Att'y Gen. No. 69-494.

Date of taking is date of special master's or assessor's award. 1970 Op. Att'y Gen. No. 70-116.

Appraisal to be updated to date of hearing before special master. — When condemnation is necessary, the appraiser should be instructed to update the appraisal to the date of the hearing before the special master; this appraisal should contemplate that the amount of the award will be paid into court by condemnor within ten days of such hearing by the special master, and this is the amount that the appraiser should be prepared to testify to if and when there is an appeal of the matter to a jury in the superior court by either party thereto. 1970 Op. Att'y Gen. No. 70-116.

Payment of city or county taxes is not proper element of damages in condemnation case. 1969 Op. Att'y Gen. No. 69-494.

Responsibility for payment of taxes on condemned property. — The payment of property taxes is a responsibility of the landowner only so long as one, in fact, owns the property. The property owner or condemnee would be responsible for payment of taxes up to the date of taking; after that time, the responsibility for the payment of these taxes would lie upon the condemning body, if in fact that body is an entity which would have the responsibility for payment of these taxes. 1969 Op. Att'y Gen. No. 69-494.

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 389 et seq.

ALR. — Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 A.L.R. 676.

Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 A.L.R.2d 724.

Right to open and close argument in trial of condemnation proceedings, 73 A.L.R.2d 613.

Good will as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

Necessity of trial or proceeding separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award, 94 A.L.R.3d 696.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 A.L.R.3d 587.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific cover, 26 A.L.R.4th 68.

22-2-100. "Condemning body" and "condemnor" defined.

As used in this article, "condemning body" or "condemnor" means:

(1) The State of Georgia or any branch or any department, board, commission, agency, or authority of the executive branch of the government of the State of Georgia;

(2) Any county or municipality of the State of Georgia;

(3) Any housing authority with approval of the governing authority of the city or county as provided in Code Section 8-3-31.1;

(4) Any other political subdivision of the State of Georgia which possesses the power of eminent domain; and

(5) All public utilities that possess the right or power of eminent domain.

History. — Ga. L. 1957, p. 387, § 1; Ga. L. 1962, p. 461, § 1; Ga. L. 1967, p. 825, § 1; Ga. L. 2006, p. 39, § 7/HB 1313.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For survey article on local government law, see 67 Mercer L. Rev. 147 (2015).

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Legislative intent of 1967 amendment was to vest power companies which supply electricity to the public with the power to condemn in fee simple for public purposes and subject to the protective statutory procedures provided in the act. Harwell v. Georgia Power Co., 246 Ga. 203, 269 S.E.2d 464 (1980).

Ga. L. 1957, p. 387, § 1 et seq. is ample authority for power company to condemn in fee simple whenever it can show a public purpose and necessity. Harwell v. Georgia Power Co., 246 Ga. 203, 269 S.E.2d 464 (1980).

Actions to condemn sewer easements are properly brought under Ga. L. 1957, p. 387, § 1 et seq. Threatt v. Fulton County, 266 Ga. 466, 467 S.E.2d 546 (1996).

Railroads as condemnors. — See Central of Ga. R.R. v. Georgia Pub. Serv. Comm'n, 257 Ga. 217, 356 S.E.2d 865 (1987).

Contract rights after condemnation. — County water and sewer authority could charge a developer tap fees after the authority acquired, by condemnation under O.C.G.A. § 22-2-100 et seq., the developer's contract with a private company which allowed termination at will; another provider's condemned contracts did not allow for termination, and thus, a rational basis existed under the Fourteenth Amendment for treating the developer differently. Highland Props. v. Lee County Utils. Auth., No. 1:00-CV-198-2(WLS), 2005 U.S. Dist. LEXIS 36015 (M.D. Ga. Sept. 30, 2005).

No bad faith shown on part of county in condemnation. — Record supported that the condemnation of the buffer property would serve a public purpose and that the county did not act in bad faith because failing to disclose the extent of methane migration provided no financial benefit for the county since at no time did the county discount the price the county was offering the property owner for the buffer property due to ignorance of the status of methane migration. Morgan County v. Gay, 352 Ga. App. 555, 834 S.E.2d 576 (2019), cert. denied, No. S20C0331, 2020 Ga. LEXIS 380 (Ga. 2020); cert. denied, No. S20C0495, 2020 Ga. LEXIS 390 (Ga. 2020); cert. denied, No. S20C0332, 2020 Ga. LEXIS 398 (Ga. 2020).

Challenge to special masters award. — Trial court properly refused to dismiss a landowner's appeal on grounds that it failed to express dissatisfaction with the compensation awarded by the special master, as it provided the utility with notice that the landowner was objecting to the valuation given on the property; moreover, in light of the interest that the utility acquired in the property, and the purposes for which it intended to use that property, consequential damages potentially represented a significant portion of

the compensation the landowner could recover. Ga. Power Co. v. Stowers, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

Condemnation of a property owner's land by a city was upheld on appeal, as was the trial court's judgment entered upon a jury verdict in the amount of $63,361 for the property and an award of attorney fees to the city, because the property owner never challenged the valuation made by a special master and also removed the amount awarded from the registry, thereby estopping the owner from challenging the legality of the taking on appeal. Mayo v. City of Stockbridge, 285 Ga. App. 58, 646 S.E.2d 79 (2007), cert. denied, No. S07C1279, 2007 Ga. LEXIS 707 (Ga. 2007).

Cited in Herron v. Metropolitan Atlanta Rapid Transit Auth., 177 Ga. App. 201, 338 S.E.2d 777 (1985); Stafford v. Bryan County Bd. of Educ., 212 Ga. App. 6, 440 S.E.2d 774 (1994); Clary v. City of Stockbridge, 300 Ga. App. 623, 686 S.E.2d 288 (2009).

22-2-101. Effect of article on other methods of condemnation; intent of article.

This article shall be supplementary to and cumulative of the methods of condemnation described in Articles 1 and 3 of this chapter in cases in which the state, or any branch of the government of the state, or any county, municipality, or other political subdivision of the state, or any housing authority, or any other person possessing the power of eminent domain is concerned. This article is intended to provide a simpler and more effective method of condemnation in those cases where a judicial supervision of the proceedings is desirable by reason of the necessity for a quick determination of the just and adequate compensation to be paid the owner of the property or interest subject to be condemned, or by reason of the number of parties at interest or the conflicting interests of such parties, or in cases where there are parties who are non compos mentis or who are not sui juris or who are nonresidents, or in cases where there are conflicting interests or doubtful questions. In all particulars not otherwise specially provided for in this article, the court shall conform its procedure as nearly as possible to Articles 1 and 3 of this chapter.

History. — Ga. L. 1957, p. 387, § 2.

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Purpose of Ga. L. 1957, p. 387, § 1 et seq. is to provide an effective method of condemnation when judicial supervision of the procedure is desirable. Golfland, Inc. v. Thomas, 107 Ga. App. 563, 130 S.E.2d 757 (1963).

The primary purpose of special master proceeding is to secure a quick determination of the compensation to be paid. City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

The special master method of condemnation is intended to be an expeditious method of arriving at a just and adequate compensation to be paid a citizen before the citizen's interest in property may be condemned. Such is accomplished by having a special master appointed to hear evidence as to the value of the property taken and damage done and then to make an award upon which the superior court can enter a judgment immediately vesting title in the condemnor upon payment of the amount awarded. Shoemaker v. De-

partment of Transp., 240 Ga. 573, 241 S.E.2d 820 (1978).

Ga. L. 1957, p. 387, § 1 et seq. does not repeal other statutory provisions for condemnation of property but is supplementary to and cumulative of them. City of Gainesville v. Loggins, 116 Ga. App. 548, 158 S.E.2d 287 (1967), rev'd on other grounds, 224 Ga. 114, 160 S.E.2d 374 (1968).

Condemnee not allowed to raise issue of right of condemnor to take property for first time on appeal. — The special master method of condemnation is intended to be an expeditious method of arriving at the just and adequate compensation to be paid a citizen before the citizen's interest in property may be condemned; allowing a condemnee to raise, for the first time on appeal from the special master's award, the right of the condemnor to take the property sought to be condemned, would obstruct this purpose. Ward v. Housing Auth., 157 Ga. App. 825, 278 S.E.2d 715 (1981).

Sufficient compliance with O.C.G.A. § 22-1-6 shown. — Trial court did not err in denying the property owners' motion to dismiss the condemnation petition, nor in overruling the owners' exception to the special master's award, because the evidence at the special master hearing showed that the telecommunications condemnor made an effort to agree on a purchase price for the property, but that those negotiations ultimately failed, which was sufficient to show that the condemnor could not procure the property by contract within the meaning of O.C.G.A. § 22-1-6. White v. Ringgold Tel. Co., 334 Ga. App. 325, 779 S.E.2d 378 (2015), cert. denied, No. S16C0404, 2016 Ga. LEXIS 148 (Ga. 2016).

Cited in Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961); Leach v. Georgia Power Co., 228 Ga. 16, 183 S.E.2d 755 (1971); Nodvin v. Georgia Power Co., 125 Ga. App. 821, 189 S.E.2d 118 (1972); Smith v. Georgia Power Co., 131 Ga. App. 380, 205 S.E.2d 916 (1974); Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976); Fourth Nat'l Bank v. Grant, 140 Ga. App. 78, 230 S.E.2d 60 (1976); Atlanta Whses., Inc. v. Housing Auth., 143 Ga. App. 588, 239 S.E.2d 387 (1977); Allen v. Hall County, 156 Ga. App. 629, 275 S.E.2d 713 (1980); Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817 (1988); Banks v. Georgia Power Co., 220 Ga. App. 84, 469 S.E.2d 218 (1996).

22-2-102. Requirements for condemnation; time of hearing; directions for notice and service; attachment of process to petition; cause to proceed in rem.

(a) In addition to the requirements set forth in Chapter 1 of this title, whenever it is desirable, for any reason, to arrive at a quick and certain determination of the compensation to be paid first to the condemnee for the taking or damaging of private property, the condemnor shall:

(1) File a petition in a superior court having jurisdiction for a judgment in rem against the property or interest therein, as provided in Code Section 22-2-130; and

(2) At or before the filing of the petition, present a copy of the petition to a judge of the superior court of the county wherein the property or interest sought to be condemned is located. Thereupon, unless waived by the parties the judge shall have a hearing in court, in chambers, or by telephone with the parties not less than ten days nor more than 30 days from the filing of the petition to appoint a special master. After such hearing, the judge shall make an order requiring the condemnor, the person in possession of the property or

interest, and each person with a legal claim or interest to appear at a hearing before a special master at a time and place specified in the order and to make known their rights, if any, in and to the property or interest sought to be condemned, their claims as to the value of the property or interest, and any other matters material to their respective rights.

(b) The hearing before the special master shall take place not less than 30 days nor more than 60 days after the date of the entry of the order appointing the special master.

(c) The order shall give such directions for notice and the service thereof as are appropriate and as are consistent with this article, in such manner as to provide most effectively an opportunity to all parties at interest to be heard. In condemnations for purposes of constructing or expanding one or more electric transmission lines, in addition to service of the order, a copy of the order shall be mailed by certified mail or sent by statutory overnight delivery to any person shown by the public ad valorem tax records of the county in which the property is located to have an interest in the property and to any other person having open and obvious possession of the property. It shall not be necessary to attach any other process to the petition except the order so made, and the cause shall proceed as in rem.

History. — Ga. L. 1957, p. 387, § 5; Ga. L. 2004, p. 568, § 1; Ga. L. 2006, p. 39, § 8/HB 1313.

Editor's notes. — Ga. L. 2004, p. 568, § 3, not codified by the General Assembly, provides that the amendment to this Code section: "shall apply to the exercise of eminent domain to acquire easements or other property interests for which land acquisition negotiations for purposes of constructing or expanding one or more electric transmission lines begin on or after such date. The provisions of this Act relating to additional compensation, reconveyance, and quitclaim shall apply to easements and other property interests acquired on or after July 1, 2004, through the exercise of eminent domain."

Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2004 amendment of this Code section, see 21 Ga. St. U.L. Rev. 157 (2004). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009).

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Procedure satisfies due process. — Ga. L. 1957, p. 387, § 5 (see O.C.G.A. § 22-2-102) supplemented by Ga. L. 1957, p. 387, §§ 10 and 11 (see O.C.G.A. §§ 22-2-107 and 22-2-108) provides reasonable notice and opportunity for a condemnee to be heard and therefore satisfies the constitutional provisions as to due process. Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959).

Government property not "private property." — "Private property" does not include property owned by a government or a governmental entity. DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

Department of Transportation may not condemn municipally owned property as the legislature has not clearly granted such authority or created a procedure therefore, and as such grant may not be implied from statutory provisions generally establishing a procedure for state agencies to condemn "private property." DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

Condemnation by special master is expeditious method of arriving at just and adequate compensation to be paid a citizen before the citizen's interest in property may be condemned. Such is accomplished by having a special master appointed to hear evidence as to the value of the property taken and the damage done and then to make an award upon which the superior court can enter a judgment immediately vesting title in the condemnor upon payment of the amount awarded. Shoemaker v. Department of Transp., 240 Ga. 573, 241 S.E.2d 820 (1978); Allen v. Hall County, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

All legal issues relating to condemnation may be raised and determined in special master proceeding. If no exceptions are taken to the master's findings or no regular appeal taken from the judgment based on the master's award, the only issue remaining is that of value. Allen v. Hall County, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

Noncompliance with notice requirement. — Condemnation hearing before a special master held less than ten days after the condemnee was served with the order was void for violation of the requirements of O.C.G.A. § 22-2-102. Black v. Fayette County, 265 Ga. 175, 453 S.E.2d 692 (1995).

Functions of special master. — Though the primary duty of the special master is to ascertain the value of the property sought to be condemned, the special master is authorized to hear and determine any legal objections that may be raised by the parties, including, the right of the condemnor to condemn, the interest, the nature of the interest taken and the effect of the condemnation upon the respective rights of the parties. Shoemaker v. Department of Transp., 240 Ga. 573, 241 S.E.2d 820 (1978); Allen v. Hall County, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

Condemnor vested with broad discretion as to necessity of taking. — It is clear that in enacting Ga. L. 1957, p. 387, § 1 et seq., the General Assembly intended to vest a very broad discretion in the condemning authority as to the necessity for the taking, and that "other matters material" to the rights of condemnees generally might be determined under proper pleadings in the case. City of Carrollton v. Walker, 215 Ga. 505, 111 S.E.2d 79 (1959).

Broad discretion as to selection of property. — Large discretion is vested in a party having the right to condemn, in the selection of particular property to be condemned. Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976).

Time for filing of defensive pleadings (as opposed to their sufficiency) is governed by the special statutory procedure of Ga. L. 1957, p. 387, § 1 et seq. Nodvin v. Georgia Power Co., 125 Ga. App. 821, 189 S.E.2d 118 (1972).

Amendment of petition to provide more specific description. — A condemnor may amend its petition by striking two paragraphs describing the proposed right of way and the uses of the right of way, and stating two new paragraphs, where all that the amendment does is to put the condemnees on notice of a more specific description of the right of way sought to be condemned and the proposed use of the right of way. Leach v. Georgia Power Co., 228 Ga. 16, 183 S.E.2d 755 (1971).

Proceeding under general civil practice rules cannot follow final adjudication. — When there has been a final adjudication in a special master condemnation proceeding which is designed to be expeditious, a party may not later tender an answer to the petition under the general rules of civil practice. Nodvin v.

Georgia Power Co., 125 Ga. App. 821, 189 S.E.2d 118 (1972).

Judicial review of master's findings. — If the special master makes findings not only as to just and adequate compensation for the property taken but also as to other matters material to the condemnee's respective rights, the proper method for the condemnee to obtain judicial review of the special master's findings in regard to matters other than the just and adequate compensation for the property taken is to file objections to the special master's award prior to the court entering an order and making the award a judgment of the court. Georgia Power Co. v. Baggarley, 133 Ga. App. 399, 211 S.E.2d 23 (1974).

When legal objections are raised before and passed upon by the special master, to obtain review of these objections exceptions must be taken to the master's findings prior to the superior court's entry of an order and judgment condemning the property. If no exceptions are taken and the master's findings are made the judgment of the court, the court's judgment is final insofar as it adjudicates these legal issues, until set aside or reversed in a manner provided by law. Allen v. Hall County, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

Condemnee bound by decision to use special master. — Having chosen and agreed to use the special master proceeding, a condemnee is bound by the applicable law regarding the special master's proceeding. Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983).

Objections or exceptions must be specific. — Litigants have a responsibility to make their timely objections or exceptions to the award of the special master in specific rather than in generalized form. Beck v. Cobb County, 180 Ga. App. 808, 350 S.E.2d 818 (1986).

Failure to file exceptions constitutes waiver. — The failure of a party to file exceptions to the master's award for determination by the superior court results in a waiver of the party's right to further litigate any nonvalue issues. Beck v. Cobb County, 180 Ga. App. 808, 350 S.E.2d 818 (1986).

Condemnation award and judgment, unexcepted to and unappealed from, is res judicata as to the issue of the existence and length of any leasehold interest. Therefore, the judgment in the condemnation proceeding is conclusive to all nonvalue issues raised on appeal. Allen v. Hall County, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

Description of property sought held sufficiently definite. — The condemnor's description of the right of way sought to be condemned was sufficiently definite when the petition (a) described with certainty the entire tract of land through which the right of way was to pass, (b) described the right of way in metes, bounds and distances, (c) described minutely the proposed construction of poles, lines, etc., for the transmission of electric current, and (d) included a plat showing the property sought to be condemned. Leach v. Georgia Power Co., 228 Ga. 16, 183 S.E.2d 755 (1971).

Dismissal of condemnation petition inappropriate. — Trial court did not err in denying the property owners' motion to dismiss the condemnation petition, nor in overruling their exception to the special master's award, because the evidence at the special master hearing showed that the telecommunications condemnor made an effort to agree on a purchase price for the property, but that those negotiations ultimately failed, which was sufficient to show that it could not procure the property by contract within the meaning of O.C.G.A. § 22-1-6. White v. Ringgold Tel. Co., 334 Ga. App. 325, 779 S.E.2d 378 (2015), cert. denied, No. S16C0404, 2016 Ga. LEXIS 148 (Ga. 2016).

Cited in Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961); Wiggins v. City of Macon, 120 Ga. App. 197, 169 S.E.2d 667 (1969); Leach v. Georgia Power Co., 228 Ga. 16, 183 S.E.2d 755 (1971); City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975); Atlanta Whses., Inc. v. Housing Auth., 143 Ga. App. 588, 239 S.E.2d 387 (1977); Hendley v. Housing Auth., 160 Ga. App. 221, 286 S.E.2d 463 (1981); Stephens v. Department of Transp., 170 Ga. App. 784, 318 S.E.2d 167 (1984); McBroom v. Georgia Power Co., 192 Ga. App. 81, 383

S.E.2d 634 (1989); Styers v. Atlanta Gas Light Co., 263 Ga. 856, 439 S.E.2d 640 (1994); Ga. Power Co. v. Stowers, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 365 et seq., 416 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 250 et seq.

ALR. — Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

22-2-102.1. Petitioning superior court for judgment in rem.

In addition to the requirements set forth in Code Section 22-1-10, whenever it shall be necessary for such condemning body to take or damage private property, or any interest or easement therein, in pursuance of any law so authorizing, for any public use, and where, by reason of the necessities of the public needs, of which the condemning body shall be the exclusive judge, and it shall be desirable for these reasons to have a quick and effective adjudication of the just and adequate compensation to be paid the owner or owners of such property before taking the same, and it shall be desirable to have a judicial ascertainment and judicial supervision of all questions and proceedings connected with the matter, such condemning body may, through any authorized representative, petition the superior court of the county having jurisdiction, for a judgment in rem against said property, or any easement or other interest in said property, condemning the same in fee simple to the use of the petitioner upon payment of just and adequate compensation therefor.

History. — Ga. L. 1957, p. 387, § 3; Code 1981, § 22-2-102.1, enacted by Ga. L. 1983, p. 3, § 16.1; Ga. L. 2006, p. 39, § 9/HB 1313.

Editor's notes. — The provisions of this Code section were previously enacted in substantially similar form by Ga. L. 1957, p. 387, § 3. However, those provisions were not enacted as part of the original Code by the Code enactment Act (Ga. L. 1981, Ex. Sess., p. 8).

Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

For note, "Standards of Judicial Review of Condemnation Proceedings Under Georgia's Special Master's Act," see 20 Ga. St. B.J. 82 (1983).

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Authority of special master. — The provision in O.C.G.A. § 22-2-102.1 that "the condemning body shall be the exclusive judge" of the public need does not give

the condemning authority an absolute right of taking based upon its own determination of necessity. The special master has the authority to hear and determine any legal objection to the taking. Central of Ga. Elec. Membership Corp. v. Mills, 196 Ga. App. 882, 397 S.E.2d 137 (1990).

Application of presumption limited. — The presumption that the right to condemn for a valid public purpose, absent a finding of its bad faith, applies only to a finding that a condemnation is necessary under O.C.G.A. § 22-2-102.1. City of Stockbridge v. Meeks, 283 Ga. App. 343, 641 S.E.2d 584 (2007).

Condemnor is the exclusive judge of necessity in condemnation for public purposes. — Under Georgia law, the condemnor is the exclusive judge of necessity in the condemnation of private property for public purposes. Mosteller Mill, Ltd. v. Ga. Power Co., 271 Ga. App. 287, 609 S.E.2d 211 (2005).

Sufficient compliance with O.C.G.A. § 22-1-6 shown. — Trial court did not err in denying the property owners' motion to dismiss the condemnation petition, nor in overruling the owners' exception to the special master's award, because the evidence at the special master hearing showed that the telecommunications condemnor made an effort to agree on a purchase price for the property, but that those negotiations ultimately failed, which was sufficient to show that the condemnor could not procure the property by contract within the meaning of O.C.G.A. § 22-1-6. White v. Ringgold Tel. Co., 334 Ga. App. 325, 779 S.E.2d 378 (2015), cert. denied, No. S16C0404, 2016 Ga. LEXIS 148 (Ga. 2016).

Ordinance infringing on utility's eminent domain power. — Forsyth County, Ga., Unified Development Code §§ 21-6.1 and 21-6.5, were defective because they required a utility to successfully comply with the ordinance's procedures, and authorized the county to deny "any or all" portions of an application; as such, they were unconstitutional infringements on the utility's legislatively-delegated power of eminent domain. Forsyth County v. Ga. Transmission Corp., 280 Ga. 664, 632 S.E.2d 101 (2006).

Cited in Banks v. Georgia Power Co., 220 Ga. App. 84, 469 S.E.2d 218 (1996); Simmons v. Webster County, 225 Ga. App. 830, 485 S.E.2d 501 (1997).

22-2-102.2. Contents of petition.

The petition referred to in Code Section 22-2-102.1 shall set forth:

(1) The facts showing the right to condemn;

(2) The property or interest to be taken or damaged;

(3) The names and residences of the persons whose property or interests are to be taken or otherwise affected, so far as known;

(4) A description of any unknown persons or classes of unknown persons whose rights in the property or interest are to be affected;

(5) A statement setting forth the necessity to condemn the private property and describing the public use for which the condemnor seeks the property; and

(6) Such other facts as are necessary for a full understanding of the cause.

History. — Ga. L. 1957, p. 387, § 4; Code 1981, § 22-2-102.2, enacted by Ga. L. 1983, p. 3, § 16.1; Ga. L. 2006, p. 39, § 10/HB 1313.

Editor's notes. — The provisions of this Code section were previously enacted in substantially similar form by Ga. L. 1957, p. 387, § 4. However, those provi-

sions were not enacted as part of the original Code by the Code enactment Act (Ga. L. 1981, Ex. Sess., p. 8).

Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For survey article on real property law, see 59 Mercer L. Rev. 371 (2007). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

JUDICIAL DECISIONS

Right to condemn. — Condemnation petitions of a municipal airport commission that failed to show the consent of the city to such actions should have been dismissed for failing to state a claim upon which relief could be granted. Lopez-Aponte v. Columbus Airport Comm'n, 221 Ga. App. 840, 473 S.E.2d 196 (1996).

County was authorized to exercise the county's right of eminent domain in connection with the expansion of a detention center because the county had jurisdiction over the maintenance of jails in the county under O.C.G.A. § 36-9-5(a), and the operation of a jail constituted a public purpose pursuant to Ga. Const. 1983, Art. IX, Sec. II, Para. V; the property owner did not identify any general law limiting the right of the county to exercise the county's power of eminent domain. Brunswick Landing, LLC v. Glynn County, 301 Ga. App. 288, 687 S.E.2d 271 (2009), cert. denied, No. S10C0558, 2010 Ga. LEXIS 246 (Ga. 2010).

Petition must sufficiently describe the property to be condemned. — Condemnor did not identify the land with sufficient specificity to convey a "danger tree maintenance" easement where the condemnor described a "transmission line" easement, but did not describe the land it wished to condemn to maintain the transmission lines. Mosteller Mill, Ltd. v. Ga. Power Co., 271 Ga. App. 287, 609 S.E.2d 211 (2005).

Petition must plead public use. — Given that a city's condemnation petition failed to plead a proposed taking for public use in compliance with O.C.G.A. § 22-2-102.2(1) and (5), a trial court did not err by dismissing the city's condemnation petition. City of Stockbridge v. Meeks, 283 Ga. App. 343, 641 S.E.2d 584 (2007).

Sufficient compliance with O.C.G.A. § 22-1-6 shown. — Trial court did not err in denying the property owners' motion to dismiss the condemnation petition, nor in overruling the owners' exception to the special master's award, because the evidence at the special master hearing showed that the telecommunications condemnor made an effort to agree on a purchase price for the property, but that those negotiations ultimately failed, which was sufficient to show that the condemnor could not procure the property by contract within the meaning of O.C.G.A. § 22-1-6. White v. Ringgold Tel. Co., 334 Ga. App. 325, 779 S.E.2d 378 (2015), cert. denied, No. S16C0404, 2016 Ga. LEXIS 148 (Ga. 2016).

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 250 et seq.

22-2-103. Appointment of special master generally.

The special master provided for in this article shall be appointed by the judge or judges of the superior courts of each judicial circuit and shall discharge the duties provided for in this article. Nothing contained in this article shall be construed as limiting the number of special masters for the circuit, and any judge of the superior court may appoint a special master for any particular case or cases. The special master so appointed must be a competent attorney at law, be of good standing in his profession, and have at least three years' experience in the practice of law. His relation and accountability to the court shall be that of an auditor or master in the general practice existing in this state. He shall hold office at the pleasure of the judge and shall be removable at any time with or without cause. Each special master shall take and file in the office of the clerk of the superior court of the county in which the property or interest to be condemned is situated, along with the order of his appointment, an oath or affidavit substantially in the form prescribed in Code Section 22-2-105.

History. — Ga. L. 1957, p. 387, § 6; Ga. L. 1984, p. 682, § 1.

Cross references. — Auditors generally, T. 9, C. 7.

Law reviews. — For article, "The New Special Master Rule — Uniform Superior Court Rule 46: Life Jackets for the Courts in the Perfect Storm," see 15 (No. 4) Ga. St. B.J. 20 (2009).

JUDICIAL DECISIONS

Special master is officer of court. — The original arbiter is no longer merely a person especially equipped to determine value; the arbiter is a competent attorney under oath especially appointed by the court. The arbiter is, accordingly, an arm of the court, and the arbiter's decision is judicial or at least quasi-judicial. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

A special master is a judicial officer within contemplation of the immunity doctrine. West End Whses., Inc. v. Dunlap, 141 Ga. App. 333, 233 S.E.2d 284 (1977).

Rulings of neither auditor nor special master are immediately final. Wiggins v. City of Macon, 120 Ga. App. 197, 169 S.E.2d 667 (1969); Sweat v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384 (1975).

Special master's rulings and findings may be excepted to in trial court and disposed of in like manner before any award, which is the end product of the proceeding, is offered to the court and a judgment of taking is entered up based on the award. Wiggins v. City of Macon, 120 Ga. App. 197, 169 S.E.2d 667 (1969).

This section obviously contemplates the possibility of exceptions and an appeal thereon to the superior court. Sweat v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384 (1975).

Challenge to special masters award. — Trial court properly refused to dismiss a landowner's appeal on grounds that it failed to express dissatisfaction with the compensation awarded by the special master, as it provided the utility with notice that the landowner was objecting to the valuation given on the property; moreover, in light of the interest that the utility acquired in the property, and the purposes for which it intended to use that property, consequential damages potentially represented a significant portion of the compensation the landowner could recover. Ga. Power Co. v. Stowers, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

Special master not obligated to re-

port findings and conclusions. — Although the relationship and accountability of a special master to the court was that of an auditor, a special master was not obligated by Ga. L. 1957, p. 387, § 6 (see O.C.G.A. § 22-2-103) to render a report in the manner prescribed in former Code 1933, § 10-203 (see O.C.G.A. § 9-7-8) containing the special master's findings and conclusions upon the law and the facts. Sweat v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384 (1975).

Recommittal of the action to a new special master was proper since the trial court found that the special master failed to apply the Georgia law relating to condemnation proceedings and found the award of the special master to be "incomplete" based on the failure of the special master to determine the just and adequate compensation of the property or interest taken. McBroom v. Georgia Power Co., 192 Ga. App. 81, 383 S.E.2d 634 (1989).

Cited in Leach v. Georgia Power Co., 228 Ga. 16, 183 S.E.2d 755 (1971); Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976).

OPINIONS OF THE ATTORNEY GENERAL

District attorney should not serve as special master in a condemnation case. 1970 Op. Att'y Gen. No. U70-39.

22-2-104. Appointment of special master form.

Substantially, the following form should be used in appointing a special master:

> _____, a competent attorney at law, residing in the _____ Judicial Circuit, and of at least three years' experience in the practice of law, is hereby appointed a special master in and for the _____ Judicial Circuit, to discharge the duties of special master as provided in the condemnation law of this state. This appointment is _____ (either for general duties or for a particular case, as the case may be).
>
> This _____ day of _____, ____.
>
> _____
>
> Judge, Superior Court

History. — Ga. L. 1957, p. 387, § 7; Ga. L. 1999, p. 81, § 22.

22-2-105. Oath of special master.

The special master is required to take the following oath to be filed along with the order of his appointment in the office of the clerk of the superior court of the county in which the property or interest to be condemned is situated:

> I, _____, do swear that I will faithfully, well, and truly perform the duties of special master under the condemnation law, according to law and to the best of my skill and ability.

Sworn to and subscribed
before me this _____
day of _____, _____.

_____
(Title and authority
of attesting officer)

History. — Ga. L. 1957, p. 387, § 8; Ga. L. 1984, p. 682, § 2; Ga. L. 1999, p. 81, § 22.

22-2-106. Compensation of special master; allowance by judge of reasonable time for special master to inspect premises.

(a) The compensation of the special master shall be provided for by a proper order of the judge of the superior court; shall be included in and made a part of the judgment of the court condemning the property or any interest therein sought to be taken, such judgment to be based on the award of the special master and shall be paid by the condemning body. Such compensation shall be left to the discretion of the court and shall not exceed a reasonable hourly rate consistent with local standards unless otherwise agreed upon by the parties with consent of the court. The compensation of the special master shall be assessed as court costs and shall be paid prior to the filing of any appeal from the judgment of the court; provided, however, that if such compensation has not been determined and assessed at the time of filing any such appeal, the same shall be paid within 30 days from the date of assessment.

(b) The judge may allow the special master a reasonable period of time for personal inspection of the premises and may compensate the special master for his or her time spent inspecting the premises and for any actual expenses incurred by the special master in connection with the inspection, provided that the special master shall file an affidavit with the court showing his or her time spent in inspection and itemizing his or her expenses.

History. — Ga. L. 1957, p. 387, § 9; Ga. L. 1975, p. 27, § 1; Ga. L. 1988, p. 408, § 2; Ga. L. 2006, p. 39, § 11/HB 1313.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

JUDICIAL DECISIONS

Compensation cannot exceed maximum statutory amount unless the actual time spent on one particular case is more than one normal working day period. City of Gainesville v. Smith, 121 Ga. App. 117, 173 S.E.2d 225 (1970).

OPINIONS OF THE ATTORNEY GENERAL

District attorney should not serve as special master in a condemnation case. 1970 Op. Att'y Gen. No. U70-39 (decided under Ga. L. 1968, p. 992, as amended).

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, §§ 250 et seq., 469 et seq.

ALR. — Liability for costs in trial tribunal in eminent domain proceedings as affected by offer or tender by condemnor, 70 A.L.R.2d 804.

22-2-107. Service of process; award by special master and judgment of court conclusive as to right of condemnor to take or damage property or interest.

(a) Copies of the petition, together with the order of the court provided for in Code Section 22-2-102, shall in all cases be served upon the person in possession of the property or interest sought to be condemned and upon all persons who are known to have any rights in such property or interest.

(b) The return of service signed by the sheriff or his lawful deputy, or an affidavit of service executed by any citizen of this state, reciting that a copy of the petition and order was served upon the named condemnee in person or by leaving a copy at the place of his residence, shall be sufficient evidence as to the service of the named condemnee. It shall be the duty of the sheriff or citizen, as the case may be, to cause service to be made within three days from the date of the order of the judge on the petition.

(c) If any of the condemnees or other persons known to have any rights in the property or interest reside outside of the county, the judge shall order service to be made upon such party or parties. Such service shall be perfected by causing a copy of the petition and order to be served upon the party or parties by the sheriff or any lawful deputy of the county of the residence of the party or parties. In addition, service may be made by any citizen. The return of such sheriff or lawful deputy, or the affidavit of such citizen that the party or parties were served, either in person or by leaving a copy of the petition and order at the residence, shall be conclusive as to service.

(d) The sheriff or any lawful deputy of the county where the petition is filed shall serve nonresidents of this state:

(1) By posting a copy of the petition, together with the order of the judge thereon, on the bulletin board at the courthouse door of the county in which the property or interest sought to be condemned is located for not less than five days prior to the time of the hearing before the special master;

(2) By the insertion of a notice identifying the property or interest sought to be condemned, as well as the date and place of the hearing before the special master, in a newspaper having general circulation in the county wherein such property or interest is located, for one issue of said paper, the date of which shall be not less than four nor more than seven days prior to the hearing before the special master, and which is the same newspaper in which the sheriff's advertisements are carried; and

(3) Where the address of such nonresidents is known, by mailing to them by registered or certified mail or statutory overnight delivery a copy of the petition and order.

(e) If any of the persons entitled to service under this Code section are minors, or insane persons, or persons otherwise laboring under disabilities, the guardian of such persons shall be served. If the guardian resides outside of the county or is a nonresident, he or she shall be served as provided in subsections (c) and (d) of this Code section. If such minor or other person laboring under disabilities has no guardian, service shall be perfected by serving the disabled person personally or, in the event the disabled person lives outside of the county or is a nonresident, by serving the disabled person by the method provided in subsections (c) and (d) of this Code section for other persons who live outside of the county or are nonresidents, and by serving the judge of the probate court of the county wherein such property or interest is located, who shall stand in the place of and protect the rights of the disabled person or appoint a guardian ad litem for such person.

(f) In the event of unknown persons or unborn remaindermen who are likely to have any rights in the property or interest or the proceeds thereof, the judge of the probate court of the county wherein such property or interest is located shall be served with a copy of the petition and order; and it shall be his duty to stand in the place and protect the rights of such unknown parties or unborn remaindermen.

(g) The purpose of this article being to quicken and simplify the condemnation proceeding in all cases where the public good requires it and to provide for a condemnation in rem against the property or interest required to be taken or damaged and insofar as is reasonably possible to protect the rights of all parties to be heard at the time of the hearing before the special master, a substantial and reasonable effort to

comply with the various modes of service provided for in this Code section shall be sufficient. Insofar as concerns the right of the condemning body to take or damage the property or any interest therein, upon the payment of the amount awarded by the special master into the registry of the court, the award of the special master and the judgment of the court condemning the property or interest to the use of the condemning body shall be conclusive.

History. — Ga. L. 1957, p. 387, § 10; Ga. L. 1966, p. 388, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2004, p. 161, § 4.3.

Editor's notes. — Ga. L. 2004, p. 161, § 16, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2005, and all appointments of guardians of the person or property made pursuant to former Title 29 shall continue in effect and shall thereafter be governed by the provisions of this Act."

Law reviews. — For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009).

JUDICIAL DECISIONS

Procedure satisfies due process. — Ga. L. 1957, p. 387, § 5 (see O.C.G.A. § 22-2-102) supplemented by Ga. L. 1957, p. 387, §§ 10 and 11 (see O.C.G.A. §§ 22-2-107 and 22-2-108) provides reasonable notice and opportunity for a condemnee to be heard and therefore satisfies the constitutional provisions as to due process. Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959).

Provisions for service on nonresidents formerly denied due process. — The portion of this section which purported to provide for posting, publishing, and mailing notices to known nonresident owners, denied due process by not naming anyone to post, publish, or mail the notice therein referred to. Ray v. Mayor of Athens, 221 Ga. 73, 143 S.E.2d 386 (1965) (decided prior to amendment of this section by Ga. L. 1966, p. 388, § 1).

Service of petition upon nonresidents. — Judgment of superior court on master's report is final judgment not subject to readjudication in the superior court; but being a final judgment, is appealable, if at all, directly to the appellate courts under the provisions of former Code 1933, § 6-701 (see O.C.G.A. § 5-6-34) by bill of exceptions on the record made before the special master; if it was not so appealable there was a hiatus in the law which it is the duty of the General Assembly and not the judiciary to supply. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Once the sanction of the court is received, by the judge of the superior court accepting the master's report and entering up a proper order and judgment condemning the described property, and once this act has been ratified by the condemnor upon the payment into the registry of the court of the amount provided for in the award that judgment is final and conclusive on the question of what property or interest therein has been condemned. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Fee simple title to condemned property vests in condemnor. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Taking is complete upon payment of award to court. — In a special master proceeding under Ga. L. 1957, p. 387, §§ 10 and 12 (see O.C.G.A. §§ 22-2-107 and 22-2-110), the taking is complete upon the award of the special master and payment into court of the amount determined. Roberts v. Wise, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

There is no right to appeal from special master award to jury on nonvalue issues. Sweat v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384 (1975).

Appellate review of question of what property interest has been

taken is not barred by the last sentence of this section. Harwell v. Georgia Power Co., 154 Ga. App. 142, 267 S.E.2d 769, aff'd, 246 Ga. 203, 269 S.E.2d 464 (1980).

Court has discretion to vacate order when notice of condemnation insufficient. — The trial court has discretion at the term at which the judgment disbursing funds is entered to vacate the order and reopen the case when it is shown to the court's satisfaction that the claimant received no notice of the condemnation proceedings. Roberts v. Wise, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

Participation in hearing waived objection to defect in service. — Since the appellants participated in the special master hearing on the date that it was held, the appellants could not complain about lack of service and notice of the hearing. Taylor v. Taylor County, 231 Ga. 209, 200 S.E.2d 887 (1973); Black v. Fayette County, 268 Ga. 570, 492 S.E.2d 517 (1997).

Cited in Atlanta Whses., Inc. v. Housing Auth., 143 Ga. App. 588, 239 S.E.2d 387 (1977); Langley Land Co. v. Monroe County, 738 F. Supp. 1571 (M.D. Ga. 1990); Black v. Fayette County, 265 Ga. 175, 453 S.E.2d 692 (1995); Ware v. Henry County Water & Sewerage Auth., 258 Ga. App. 778, 575 S.E.2d 654 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 433 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 306 et seq., 512 et seq., 521 et seq. 72 C.J.S., Process, §§ 1 et seq., 32 et seq.

ALR. — Condemnor's right, as against condemnee, to interest on excessive money deposited in court or paid to condemnee, 99 A.L.R.2d 886.

22-2-108. Powers and duties of special master generally.

The special master appointed pursuant to Code Section 22-2-103 shall serve in lieu of a board of assessors; provided, however, that if two assessors are selected pursuant to Code Section 22-2-108.1, the special master shall serve as the chairperson of the special master panel and shall decide all issues other than value issues which arise at the hearing provided for in Code Section 22-2-102. The special master's duties and authority, except as otherwise provided for in this article, shall be the same as provided by Code Sections 22-2-61 through 22-2-63. The special master shall hold the hearing provided for in Code Section 22-2-102 at the time and place provided by the order of the judge of the superior court and in compliance with the duties and authority conferred by this article. The special master shall not be authorized to continue or delay the hearing, except as otherwise provided by Code Section 22-2-108.1, relating to granting of a recess for selection of assessors, or by Code Section 9-10-150, relating to granting continuances by reason of membership in the General Assembly during sessions thereof, or except upon the written order of the judge of the superior court; and such a continuance shall be granted only for good cause shown to that judge. When it shall be necessary for the judge to grant a continuance, the continuance shall be for not more than five days from the date of the order granting the continuance.

History. — Ga. L. 1957, p. 387, § 11; Ga. L. 1973, p. 479, § 1; Ga. L. 1998, p. 1539, § 3.

Law reviews. — For review of 1998 legislation relating to eminent domain, see 15 Ga. St. U.L. Rev. 115 (1998).

JUDICIAL DECISIONS

Procedure satisfies due process. — Ga. L. 1957, p. 387, § 5 (see O.C.G.A. § 22-2-102) supplemented by Ga. L. 1957, p. 387, §§ 10 and 11 (see O.C.G.A. §§ 22-2-107 and 22-2-108) provides reasonable notice and opportunity for a condemnee to be heard and therefore satisfies the constitutional provisions as to due process. Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959).

Condemnee bound by decision to use special master. — Having chosen and agreed to use the special master proceeding, a condemnee is bound by the applicable law regarding the special master's proceeding. Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983).

Duty of special master. — The primary duty of the special master is to ascertain the value of the property sought to be condemned and the consequential damages or benefits, if any, with the authority to hear and determine any legal objections raised by the parties. Leach v. Georgia Power Co., 228 Ga. 16, 183 S.E.2d 755 (1971); Ward v. Housing Auth., 157 Ga. App. 825, 278 S.E.2d 715 (1981).

The primary duty of the special master is to ascertain the total amount in money that will be equivalent to "just and adequate compensation" for the property and the interests in property being taken by the condemnor. Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976).

Issues to be resolved by special master. — All issues as to the right of the condemnor to condemn, the interest to be condemned, the nature of the interest taken, and the effect of the condemnation upon the respective rights of the parties are to be resolved by the special master. State Hwy. Dep't v. Thomas, 115 Ga. App. 372, 154 S.E.2d 812 (1967).

Legal objections raised by parties may include, for example, the right of the condemnor to condemn, the interest to be condemned, the nature of the interest taken and the effect of the condemnation upon the respective rights of the parties. Ward v. Housing Auth., 157 Ga. App. 825, 278 S.E.2d 715 (1981).

Exceptions to findings of special master required for review. — When legal objections or issues are raised before and passed upon by the special master, to obtain a review in the pending condemnation case exceptions must be taken to the orders of the special master. Leach v. Georgia Power Co., 228 Ga. 16, 183 S.E.2d 755 (1975).

When legal objections are raised before and passed upon by the special master, to obtain review of these objections exceptions must be taken to the master's findings prior to the superior court's entry of an order and judgment condemning the property. Ward v. Housing Auth., 157 Ga. App. 825, 278 S.E.2d 715 (1981).

When no exceptions are taken to master's finding and it is made judgment of court, it is final until set aside or reversed in a manner provided by law. State Hwy. Dep't v. Thomas, 115 Ga. App. 372, 154 S.E.2d 812 (1967); Ward v. Housing Auth., 157 Ga. App. 825, 278 S.E.2d 715 (1981).

Statutory construction when procedural provisions incomplete. — When wording is taken from a prior statute, or when Ga. L. 1957, p. 387, § 1 et seq. fails to be complete within itself, then reference to provisions for proceedings before assessors is permitted to fill in the void. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Condemnee is not required to litigate tort claim as part of condemnation proceeding when special master was not empowered to hear such claim. Georgia Power Co. v. Johnson, 155 Ga. App. 862, 274 S.E.2d 17 (1980).

Continuance. — O.C.G.A. § 22-2-108 mandates that no continuance be granted in excess of five days and does not denominate one rule for condemnors and another

rule for condemnees, so when the condemnor failed to abide by the clear language of the statutory method the condemnor elected to follow, and the record was clear that condemnees at no time acquiesced in or waived strict compliance with § 22-2-108, the trial court erred by not declaring the hearing of the special master void for violation of § 22-2-108. Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817, cert. denied, 186 Ga. App. 919, 367 S.E.2d 817 (1988).

The language in O.C.G.A. § 22-2-108 restricting the duration of continuances benefits the condemning authority by expediting the condemnation process. Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817, cert. denied, 186 Ga. App. 919, 367 S.E.2d 817 (1988).

Cited in Nodvin v. Georgia Power Co., 125 Ga. App. 821, 189 S.E.2d 118 (1972); Atlanta Whses., Inc. v. Housing Auth., 143 Ga. App. 588, 239 S.E.2d 387 (1977); Hendley v. Housing Auth., 160 Ga. App. 221, 286 S.E.2d 463 (1981); Ga. Transmission Corp. v. Barron, 255 Ga. App. 645, 566 S.E.2d 363 (2002).

OPINIONS OF THE ATTORNEY GENERAL

It is responsibility of special master to establish value of property condemned, and nothing more; the special master's duty is to assess the value of the property taken or damaged, and also to assess the consequential damages and benefits to the property not taken. 1969 Op. Att'y Gen. No. 69-494.

Payment of city or county taxes is not proper element of damages in condemnation case. 1969 Op. Att'y Gen. No. 69-494.

Responsibility for payment of taxes on condemned property. — The payment of property taxes is a responsibility of the landowner only so long as the landowner, in fact, owns the property. The property owner or condemnee would be responsible for payment of taxes up to the date of taking; after that time, the responsibility for the payment of these taxes would lie upon the condemning body, if in fact that body is an entity which would have the responsibility for payment of these taxes. 1969 Op. Att'y Gen. No. 69-494.

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 389 et seq.

ALR. — Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

Power of successor or substituted master or referee to render decision or enter judgment on testimony heard by predecessor, 70 A.L.R.3d 1079.

22-2-108.1. Special master panel; selection; notice; powers and duties.

(a) At any time at least five calendar days before commencement of the hearing specified in the order of the judge of the superior court, the condemnee or any other person having a right or interest in the property may, by written notice served on the condemnor and all other parties to the proceeding, select an assessor to hear and decide value issues at the hearing. Within five days after receipt of such notice, the condemnor shall, by written notice served on the condemnee and all other parties to the proceeding, select an assessor to hear and decide value issues at the hearing. The provisions of Code Sections 22-2-40 and

22-2-41 shall apply to the selection of such assessors; provided, however, that the special master appointed pursuant to Code Section 22-2-103 shall serve as the third assessor, shall be compensated as provided for in Code Section 22-2-106, and shall continue to perform the duties set forth in Code Section 22-2-108. Notwithstanding the number of condemnees or any other persons having a right or interest in the property, only one assessor shall be selected on behalf of all such condemnees or interested parties.

(b) In the event that the notice selecting an assessor by the condemnee or other person having a right or interest in the property is not served on the condemnor more than five days before the time on which the hearing is to commence as specified in the order of the judge of the superior court, the special master shall convene the hearing at the time and place specified in the order; and if requested by the condemnor, the special master shall then recess the hearing to a date certain, but not more than five calendar days after such time, to allow the condemnor additional time to select an assessor.

(c) After the condemnee or other person having a right or interest in the property has selected an assessor and the condemnor has selected an assessor, the special master and the two assessors selected by the parties shall constitute the special master panel and, except as otherwise provided in this article, shall perform the duties provided by Code Sections 22-2-61 through 22-2-63. A majority of the special master panel shall decide all value issues which arise at the hearing provided for in Code Section 22-2-102 and shall prepare and submit the award as provided in Code Section 22-2-110.

History. — Code 1981, § 22-2-108.1, enacted by Ga. L. 1998, p. 1539, § 3.

Law reviews. — For review of 1998 legislation relating to eminent domain, see 15 Ga. St. U.L. Rev. 115 (1998).

JUDICIAL DECISIONS

Cited in Morgan County v. Gay, 352 Ga. App. 555, 834 S.E.2d 576 (2019).

22-2-109. Factors to be considered in determining or estimating just and adequate compensation; determination of date of taking; inclusion of date of approval of original location of highway in petition for condemnation; newspaper advertisement.

(a) In determining or estimating just and adequate compensation to be paid to the owner of any property or interest condemned for public road and street purposes, neither the special master nor the special master panel, in the event such a panel exists, nor the jury, in the event of an appeal to a jury, shall be restricted to the agricultural or

productive qualities of the land; but inquiry shall be made as to all other legitimate purposes to which the land could be appropriated. The date of taking as contemplated in this Code section shall be the date of the filing of the condemnation proceedings for the acquisition of the property or interest.

(b) The condemning authority shall cause the petition for condemnation to set forth the date of the approval of the original location of the highway. It shall be the further duty of the condemning authority, within 30 days from the date of the original approval and designation of said location as a highway, to cause the location of said highway in said county to be advertised once each week for four consecutive weeks in the newspaper of the county in which the sheriff's advertisements are carried; and said advertisement shall designate the land lots or land districts of said county through which such highway will be located. Said advertisement shall further show the date of the said original location of such highway as hereinbefore provided for in this subsection. Said advertisement shall further state that a plat or map of the project showing the exact date of original location is on file at the office of the Department of Transportation, and that any interested party may obtain a copy of same by writing to the Department of Transportation (One Georgia Center, 600 West Peachtree NW, Atlanta, Georgia 30308) and paying a nominal cost therefor.

(c) In determining just and adequate compensation for property or interests taken or condemned for public road and street purposes, the award of the special master or the special master panel, in the event such a panel exists, or the verdict of the jury, in the event of an appeal, shall, in addition to fixing the value of the land actually taken and used for such purposes, take into consideration the prospective and consequential damages to the remaining property or interest from which the property or interest actually taken was cut off, which consequential damages result to such remaining property or interest because of the location of such public road or street upon the portion actually taken. In addition, the increase of the value of such remaining property or interest from the location of such public road or street shall be considered. Such consequential benefits, if any, may be offset against such consequential damages, if any; but in no event shall consequential benefits be offset against the value of the property or interest taken for such public improvement.

History. — Ga. L. 1966, p. 320, § 2; Ga. L. 1998, p. 1539, § 4; Ga. L. 2011, p. 752, § 22/HB 142.

Cross references. — Provisions regarding condemnation of property for public road purposes, § 32-3-4 et seq.

Law reviews. — For review of 1998 legislation relating to eminent domain, see 15 Ga. St. U.L. Rev. 115 (1998). For survey article on real property law, see 59 Mercer L. Rev. 371 (2007). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

For comment on State Hwy. Dep't v.

Lumpkin, 222 Ga. 727, 152 S.E.2d 557 (1966), see 3 Ga. St. B.J. 483 (1967).

JUDICIAL DECISIONS

What is just and adequate compensation is justiciable question, and only the judiciary can lawfully determine that question. Calhoun v. State Hwy. Dep't, 223 Ga. 65, 153 S.E.2d 418 (1967).

Applicability. — It was error to hold that the date of taking property to acquire an easement for electrical transmission and distribution lines was the date of filing of the original condemnation petition; because the property was not being condemned for public street and road purposes, the date of taking was not governed by O.C.G.A. § 22-2-109, but by O.C.G.A. §§ 22-2-110 and 22-2-111, and thus the date of taking was when the amount provided in the award was paid into the trial court's registry. Orr v. Ga. Transmission Corp., 281 Ga. 754, 642 S.E.2d 809 (2007).

There are only two elements of damages to be considered in condemnation proceeding: first, the market value of the property actually taken; second, the consequential damage that will naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting of it to the purposes for which it is condemned. Simon v. Department of Transp., 245 Ga. 478, 265 S.E.2d 777 (1980).

Anything that actually enhances value of land must be considered in order to meet the constitutional demand that the owner be paid before the taking, adequate and just compensation. DOT v. Arnold, 154 Ga. App. 502, 268 S.E.2d 775 (1980).

There are three recognized techniques for determining market value: replacement cost new less depreciation, income, and comparable sales. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Measure of consequential damages, if any, to the property which the condemnee retains, is the market value of the remainder in its circumstances just prior to the time of the taking, as compared with its market value in its new circumstances just after the time of the taking. Simon v. Department of Transp., 245 Ga. 478, 265 S.E.2d 777 (1980).

Compensable damage must differ in kind from damage to general public. — Damage suffered by the condemnee which is different from that suffered by the general public in degree only, and not in kind, is not compensable or recoverable. Dougherty County v. Snelling, 132 Ga. App. 540, 208 S.E.2d 362 (1974), overruled on other grounds, Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976).

Land and its natural components are one subject matter and what is required is evidence of the fair market value of that one subject matter. DOT v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

The only relevant inquiry in an appeal from the amount awarded by the special master was the overall value of the property condemned pursuant to this Article, with the fact that the property contained "chewacla" soil being taken into account; the trial court did not err in excluding irrelevant testimony as to the separate value of the "chewacla" soil located on the property. Williams v. Mayor of Carrollton, 195 Ga. App. 590, 394 S.E.2d 389 (1990).

Improvements on land are proper subjects for independent valuation in consideration of the just and adequate compensation for the total property taken. DOT v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Existing zoning regulations can be pertinent in a condemnation proceeding. DOT v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Attorneys' fees need not be included in the measure of just compensation under the Georgia Constitution. Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980), cert. denied, 450 U.S. 936, 101 S. Ct. 1403, 67 L. Ed. 2d 372 (1981).

Lost profits may be used as means of awarding just and adequate compensation because the income approach

necessarily takes into account what future earnings would be were the property interest not extinguished. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Change in traffic pattern. — Adjoining owners of property or operators of businesses on property adjoining a street or highway have no vested interest in the traffic pattern which controlling authorities may provide for the public street from time to time. If they suffer damage when the pattern is changed it is a damage suffered by members of the general public owning property or operating businesses adjacent to a street or highway, and for which there can be no recovery. The damage is not peculiar to the condemnees. Dougherty County v. Snelling, 132 Ga. App. 540, 208 S.E.2d 362 (1974), overruled on other grounds, Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976).

Property is "unique" when fair market value will not afford just compensation. — Since valuing property at its fair market value presupposes a willing buyer and a willing seller, properties are "unique" such that fair market value will not afford just and adequate compensation when they are not of a type generally bought or sold in the open market. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Whether or not property is unique is a jury question. DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

"Unique" property is measured by variety of nonfair market methods of valuation, including the cost and income methods. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Recovery of business losses. — Business losses are recoverable as a separate item only if the property is "unique." DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

When a business belongs to the landowner, total destruction of the business at the location must be proven before business losses may be recovered as a separate element of compensation. DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

When the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land whether the destruction of the lessee's business is total or merely partial, provided only that the loss is not remote or speculative. DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

Remaining term of lease determined. — When a lease provided that, for four additional five-year terms, tenants had the option of extending the lease, although rent for the renewal periods was not agreed to, the trial court correctly held that the tenants had only a nine month's tenancy remaining on the date of taking because the 20-year renewal provision was unenforceable for a lack of certainty as to the amount of rent for that renewal period. Cann v. Metropolitan Atlanta Rapid Transit Auth., 196 Ga. App. 495, 396 S.E.2d 515 (1990).

Enhancement or impairment of value and lost profits not part of market value. — The enhancement or impairment of value of the land, or the loss of profits resulting from the announcement of condemnation proceedings are not part of market value for the purposes of just and adequate compensation. R.E. Adams Properties, Inc. v. City of Gainesville, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Loss of established business separate item from value of building. — The loss of an established business is a separate and distinct item from the amount which a condemnee is entitled to recover as the actual value of the condemnee's building. R.E. Adams Properties, Inc. v. City of Gainesville, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Market value of property a jury question. — Market value of property taken by the Department of Transportation is a matter of opinion, and may be established by direct as well as circumstantial evidence; it is peculiarly a matter for the jury, and the jury is not absolutely bound even by uncontradicted testimony of experts, but may consider the nature of the property involved, together with any other fact or circumstance properly within the knowledge of the jury which tends to

establish the value of the property, and may arrive at a different figure than that of the experts, higher or lower, when the verdict reached is not so disparate as to justify an inference of gross mistake or undue bias. DOT v. Delta Mach. Prods. Co., 157 Ga. App. 423, 278 S.E.2d 73 (1981).

Jury consideration of actual value of land. — While there may be circumstances in which the market value of the total property and the actual value of the improvements plus the actual value of the land are not the same, in such event the jury may still consider the actual value of the land or interest therein appropriated. DOT v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Pro rata valuation in partial taking not authorized. — Charge to jury which employed a pro rata method of assessing the value of a partial taking was erroneous; statutes which govern the manner of assessment and set out the factors considered in determining compensation do not express such a relational mode. Bland v. Bulloch County, 205 Ga. App. 317, 422 S.E.2d 223, cert. denied, 205 Ga. App. 899, 422 S.E.2d 223 (1992).

Jury cannot consider value of property prior to time of taking. — Since the compensation to be paid for property condemned is to be determined by its value at the time of its actual taking, a jury cannot consider the value at a time prior to the actual time of taking. West v. City of Atlanta, 123 Ga. App. 255, 180 S.E.2d 277 (1971).

Jury cannot determine date of taking for compensation purposes. — The jury is not free to determine on the evidence that some date prior to the initiation of condemnation proceedings but after the announcement of the intent to condemn is the date of taking for the purposes of just and adequate compensation. R.E. Adams Properties, Inc. v. City of Gainesville, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Testimony of expert who examines property before and after taking. — When an expert witness testifies as to the value of property in a condemnation case, and the examination of the witness discloses that the witness's examination of the property had been made both before and after the date of taking, this does not prevent the witness's testimony from having probative value as to the date of taking when the witness testifies as to the witness's familiarity with the property as of the date of taking. The witness's entire testimony cannot be excluded. West v. City of Atlanta, 123 Ga. App. 255, 180 S.E.2d 277 (1971).

It was not error to fail to charge on consequential benefits when, although two witnesses mentioned consequential benefits, there was no evidence as to such benefits from which the jury could reasonably estimate the amount. City of Alma v. Morris, 180 Ga. App. 420, 349 S.E.2d 277 (1986).

Nonexpert opinion on value. — When each of the nonexpert witnesses showed familiarity with the property in question, knowledge of sales in the vicinity, and consequently knowledge of land values in the community, the cross-examination revelation that there may have been a lack of understanding as to many factors involved in formally determining land value may have served to weaken and discredit the testimony but did not render it inadmissible or incompetent. City of Alma v. Morris, 180 Ga. App. 420, 349 S.E.2d 277 (1986).

Condemnor's testimony, standing alone, held inadmissible on question of consequential damages. — When a limited access highway is condemned by the state, which highway cuts off several acres from the remainder of the land of the condemnee leaving those several acres without any access thereto, testimony offered by the condemnor that with access there would be no damage to the isolated land, standing alone, is inadmissible and without probative value on the question of consequential damages to those several acres without access. State Hwy. Dep't v. Howard, 124 Ga. App. 76, 183 S.E.2d 26 (1971).

Cited in Simmons v. Webster County, 225 Ga. App. 830, 485 S.E.2d 501 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 112 et seq. 27 Am. Jur. 2d, Eminent Domain, §§ 433 et seq, 440, 485.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 90 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 346 et seq., 380 et seq.

ALR. — Right to interest in condemnation proceedings during owner's retention of possession, 32 A.L.R. 98.

Measure of damages or compensation where property is taken to widen street, 64 A.L.R. 1513.

Right of property owner to compensation for diversion of traffic by relocation or rerouting of highway, 118 A.L.R. 921.

Deduction of benefits in determining compensation or damages in eminent domain, 145 A.L.R. 7.

What physical construction amounts to a change of grade within statute relating to award of damages, 156 A.L.R. 416.

Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property, 6 A.L.R.2d 1197.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Elements and measure of compensation in eminent domain for temporary use and occupancy, 7 A.L.R.2d 1297.

Fire risk or hazard as element of damages in condemnation proceedings, 63 A.L.R.2d 313.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 A.L.R.2d 1453.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 A.L.R.2d 772.

Eminent domain: restrictive covenant or right to enforcement thereof as compensable property right, 4 A.L.R.3d 1137.

Propriety and effect, in eminent domain proceedings, of argument or evidence as to source of funds to pay for property, 19 A.L.R.3d 694.

Eminent domain: admissibility, on issue of value of condemned real property, of rental value of other real property, 23 A.L.R.3d 724.

Award of, or pending proceedings for, compensation for property condemned, as precluding action for damages arising from prior trespasses upon it, 33 A.L.R.3d 1132.

Eminent domain: cost of substitute facilities as measure of compensation paid to state or municipality for condemnation of public property, 40 A.L.R.3d 143.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 A.L.R.3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 A.L.R.3d 581.

Eminent domain: condemnor's liability for costs of condemnee's expert witnesses, 68 A.L.R.3d 546.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 A.L.R.3d 752.

Assemblage or plottage as factor affecting value in eminent domain proceedings, 8 A.L.R.4th 1202.

Eminent domain: compensability of loss of view from owner's property—state cases, 25 A.L.R.4th 671.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

Abutting owner's right to damages for limitation of access caused by traffic regulation, 15 A.L.R.5th 821.

Elements and measure of compensation in eminent domain proceeding for temporary taking of property, 49 A.L.R.6th 205.

22-2-110. Award of special master and special master panel; time of filing; award to become part of record of proceedings; vesting of title in condemnor upon deposit of award into court; form of award; use in subsequent appeal.

(a) The award of the special master or the special master panel, in the event such a panel exists, shall be served in a manner consistent with Code Section 9-11-5 upon all the parties and filed with the clerk of the superior court of the county where the property or interest is situated within three days after the date on which such hearing is completed. The special master or the special master panel shall mail the award to the condemnor and any condemnees on the date of filing of the award and provide a certificate of service evidencing the mailing of such award.

(b) The award shall become a part of the record of the proceedings in said matter and shall condemn and vest title to the property or other interest in the condemning body upon the deposit by that body of the amount of the award into the registry of the court, subject to the demand of such condemnee or condemnees, according to their respective interests.

(c) The award shall be in the following form:

"AWARD

The special master appointed and chosen by the court to hear evidence and give full consideration to all matters touching upon the value of the property or interest sought to be condemned, as shown by the description of the property or interest in the case of _____ (condemning body) versus _____ (acres of land or other described interest in said land) and _____ (condemnee), Civil action file no.____ in superior court, having first taken the oath as required by law of the special master, the same having been filed with the clerk of the Superior Court of _____ County, and the special master panel, in the event such a panel exists, having heard evidence under oath and given consideration to the value of such property or interest on the _____ day of _____, at ____:____ __.M., as provided for in the order of the court, do decide and recommend to the court as follows:

(1) I/We find and award to _____, condemnee, the sum of $_____, as the actual market value of the property or interest sought to be condemned;

(2) I/We find consequential damages to the remaining property or interest in the amount of $_____;

(3) I/We find consequential benefits to the remaining property or interest in the amount of $_____ (never to exceed the amount of the consequential damages);

(4) I/We find and award to _____, condemnee, the sum of $_____, as the value of any associated moving costs;

(5) Balancing the consequential benefits against the consequential damages, I/we find and award to the condemnee in this case in the total sum of $_____, and I/we respectfully recommend to the court that the said property or interest be condemned by a judgment in rem to the use of the condemnor upon the payment of the last stated sum into the registry of the court, subject to the demands of the condemnee.

This _____ day of _____, ____.

_____
Special Master

_____
Assessor

_____
Assessor"

(d) In any case where there is an appeal from the award of the special master or the special master panel, in the event such a panel exists, to a jury in the superior court, such award shall not be competent evidence. Any such appeal shall be a de novo investigation, and such award shall be detached from the papers in the case before the same are delivered to the jury.

History. — Ga. L. 1957, p. 387, § 12; Ga. L. 1984, p. 682, § 3; Ga. L. 1998, p. 1539, § 5; Ga. L. 2006, p. 39, § 12/HB 1313; Ga. L. 2016, p. 864, § 22/HB 737.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1998, in the undesignated language in the form in subsection (c), "evidence and" was substituted for "evidence,", "and" was deleted following "in superior court," and a comma was added following "Superior Court of _____ County".

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

Adequate method for determining compensation. — The General Assembly, by enacting Ga. L. 1957, p. 387, §§ 5, 11, and 14 (see O.C.G.A. §§ 22-2-102, 22-2-108, and 22-2-112), has provided an adequate method for determining the just

and adequate compensation of property sought to be condemned under Ga. L. 1957, p. 387, § 12 (see O.C.G.A. § 22-2-110) of the act in no wise limits the master to an arbitrary finding. Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959).

This section provides notice as a matter of law to all of the parties and their counsel that the award will be filed within the required time and that an attempt to appeal the matter to a jury in the superior court coming more than 10 days after its filing, as provided by § 22-2-112, comes too late. Wilson v. City of Waycross, 130 Ga. App. 253, 203 S.E.2d 301 (1973).

Time of filing award. — Condemnation proceeding was not voided and nullified by the fact that special master's award was not filed with clerk of court within three days after date of hearing since the requirement of speedy disposition to protect the property owner is directory rather than jurisdictional. Savage v. Thomaston-Upson County Office Bldg. Auth., 205 Ga. App. 634, 422 S.E.2d 896, cert. denied, 205 Ga. App. 901, 422 S.E.2d 896 (1992).

There is no provision in O.C.G.A. § 22-2-110 which tolls the filing period for an appeal in the event that the special master fails to file the awards within three days of the hearing. Garner v. Georgia Transmission Corp., 235 Ga. App. 889, 510 S.E.2d 624 (1999).

Date of taking. — It was error to hold that the date of taking property to acquire an easement for electrical transmission and distribution lines was the date of filing of the original condemnation petition; because the property was not being condemned for public street and road purposes, the date of taking was not governed by O.C.G.A. § 22-2-109, but by O.C.G.A. §§ 22-2-110 and 22-2-111, and thus the date of taking was when the amount provided in the award was paid into the trial court's registry. Orr v. Ga. Transmission Corp., 281 Ga. 754, 642 S.E.2d 809 (2007).

No property taken until payment of award. — No property is taken under the special master procedure until the payment of the award into the registry of the court is made. Arnold v. State Hwy. Dep't, 116 Ga. App. 201, 156 S.E.2d 469 (1967).

In a special master proceeding under Ga. L. 1957, p. 387, §§ 10 and 12 (see O.C.G.A. §§ 22-2-107 and 22-2-110), the taking is complete upon the award of the special master and payment into court of the amount determined. Roberts v. Wise, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

Payment of award not condition precedent to condemnor's appeal. — A condemnor is not required to pay the award of the special master into the registry of the court within ten days after the filing of the award, or at the time of, or prior to the filing of the appeal as a condition precedent to its right of appeal. Arnold v. State Hwy. Dep't, 116 Ga. App. 201, 156 S.E.2d 469 (1967).

Title vests upon entry of condemnation judgment. — Because title to an owner's property vested in a city upon the entry of a condemnation judgment and the payment of the award to the owner in accordance with O.C.G.A. §§ 22-2-110(b) and 22-2-111, the city was without authority to unilaterally dismiss the condemnation action and demand return of the previously paid award. Gramm v. City of Stockbridge, 297 Ga. App. 165, 676 S.E.2d 818 (2009).

Non-value issues are not subject to de novo review under subsection (d) of O.C.G.A. § 22-2-110 upon filing an appeal to a jury. Styers v. Atlanta Gas Light Co., 263 Ga. 856, 439 S.E.2d 640 (1994).

On appeal from a special master's award, the court was not required to conduct an evidentiary hearing on non-value issues because that would allow new evidence which was not before the special master or a repetition of evidence which should have been preserved by transcript. Simmons v. Webster County, 225 Ga. App. 830, 485 S.E.2d 501 (1997), cert. denied, 522 U.S. 1110, 118 S. Ct. 1041, 140 L. Ed. 2d 106 (1998).

Testimony of special master. — While there is nothing in the statute barring a special master from testifying, obviously the admission of the master's testimony must be governed by the applicable rules of evidence. Garner v. Gwinnett County, 105 Ga. App. 714, 125 S.E.2d 563 (1962).

Interest under the special master proceeding is calculated from the

date of the award, i.e., the time of the "taking." Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983).

Denial of motion to dismiss held not appealable. — A denial of a motion to dismiss condemnation proceedings on the ground that their initiation was beyond the power of the condemning authority may not be appealed when the case is still pending and no certificate of immediate review was obtained from the trial judge. Norton Realty & Loan Co. v. Board of Educ., 123 Ga. App. 620, 182 S.E.2d 185 (1971).

Cited in Georgia Power Co. v. Bray, 232 Ga. 558, 207 S.E.2d 442 (1974); City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975); Sweat v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384 (1975); Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983); Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817 (1988); Langley Land Co. v. Monroe County, 738 F. Supp. 1571 (M.D. Ga. 1990); Banks v. Georgia Power Co., 220 Ga. App. 84, 469 S.E.2d 218 (1996); Threatt v. Forsyth County, 250 Ga. App. 838, 552 S.E.2d 123 (2001).

OPINIONS OF THE ATTORNEY GENERAL

Appeal costs. — Appellants contesting the award of a special master need not pay the advance court cost deposit set forth in O.C.G.A. §§ 9-15-4 and 15-6-77 if the appellants have properly paid the required costs for filing the initial condemnation petition. 1985 Op. Att'y Gen. No. U85-17.

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 389 et seq.

ALR. — Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 A.L.R. 194.

Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 A.L.R.4th 889.

22-2-111. Incorporation of award into judgment of court.

Upon the entry of the award of the special master or the special master panel, if such a panel exists, and the presentation of the award to the judge of the superior court, the judge shall enter a proper order and judgment of the court condemning the described property or other interest in rem to the use of the condemnor upon the condemnor's paying into the registry of the court the amount provided in the award.

History. — Ga. L. 1957, p. 387, § 13; Ga. L. 1998, p. 1539, § 6.

Law reviews. — For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007). For survey article on local government law, see 67 Mercer L. Rev. 147 (2015).

JUDICIAL DECISIONS

This section does not violate state constitutional prerequisite that just and adequate compensation shall first be paid before private property is taken for public use, since the method of determining what is just and adequate compensation is a matter of legislative discretion, and the method prescribed

herein fully and adequately protects that constitutional right. Anthony v. State Hwy. Dep't, 215 Ga. 853, 113 S.E.2d 768 (1960).

Time of taking is spelled out in this section. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

No property taken until payment of award. — No property is taken under the special master procedure until the payment of the award into the registry of the court is made. Arnold v. State Hwy. Dep't, 116 Ga. App. 201, 156 S.E.2d 469 (1967).

It was error to hold that the date of taking property to acquire an easement for electrical transmission and distribution lines was the date of filing of the original condemnation petition; because the property was not being condemned for public street and road purposes, the date of taking was not governed by O.C.G.A. § 22-2-109, but by O.C.G.A. §§ 22-2-110 and 22-2-111, and thus the date of taking was when the amount provided in the award was paid into the trial court's registry. Orr v. Ga. Transmission Corp., 281 Ga. 754, 642 S.E.2d 809 (2007).

Payment of award not condition precedent to condemnor's appeal. — A condemnor is not required to pay the award of the special master into the registry of the court within ten days after the filing of the award, or at the time of, or prior to the filing of the appeal as a condition precedent to its right of appeal. Arnold v. State Hwy. Dep't, 116 Ga. App. 201, 156 S.E.2d 469 (1967).

Exceptions to special master's rulings on nonvalue issues must be made prior to judgment authorized by this section. Sweat v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384 (1975); Earth Mgt., Inc. v. Heard County, 248 Ga. 442, 283 S.E.2d 455 (1981); Wisenbaker v. Lowndes County, 175 Ga. App. 825, 335 S.E.2d 1 (1985).

Exceptions to amended award. — O.C.G.A. § 22-2-112 does not set forth any exception to the ten-day period for appeal, and the right to file extended to exceptions taken to an amended award not substantively changing an original award. Stafford v. Bryan County Bd. of Educ., 267 Ga. 274, 476 S.E.2d 727 (1996).

Amendments not allowed after entry of judgment. — Once a condemnation judgment has been entered vesting title in the condemnor, amendments increasing or decreasing the amount or quantum of property taken cannot be allowed. Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976).

Upon payment of an award into the court and the entry of the judgment of condemnation, title to the property vested in the county under O.C.G.A. § 22-2-112, and since an amendment to alter the quantum of the property taken is not permissible after title vests, the county could not correct the county's mistake that caused the county to condemn the wrong property either by amendment or by dismissing the county's petition. Gatefield Corp. v. Gwinnett County, 234 Ga. App. 621, 507 S.E.2d 164 (1998).

Title vests upon entry of condemnation judgment. — Because title to an owner's property vested in a city upon the entry of a condemnation judgment and the payment of the award to the owner in accordance with O.C.G.A. §§ 22-2-110(b) and 22-2-111, the city was without authority to unilaterally dismiss the condemnation action and demand return of the previously paid award. Gramm v. City of Stockbridge, 297 Ga. App. 165, 676 S.E.2d 818 (2009).

Cited in Wiggins v. City of Macon, 120 Ga. App. 197, 169 S.E.2d 667 (1969); Taylor v. Taylor County, 231 Ga. 209, 200 S.E.2d 887 (1973); City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

22-2-112. Appeal of award generally; condemnee's right to jury trial on issue of just and adequate compensation.

(a) If the condemnor or any condemnee is dissatisfied with the amount of the award, an appeal shall be filed in the superior court and such appeal shall be filed within ten calendar days from the service of the award, plus three additional calendar days for mailing of the award.

At the term succeeding the filing of the appeal, it shall be the duty of the judge to cause an issue to be made and tried by a jury as to the value of the property or interest taken or the amount of damage done, with the same right to move for a new trial and file an appeal as in other cases at law. The entering of an appeal and the proceedings thereon shall not hinder or delay in any way the condemnor's work or the progress thereof.

(b) The condemnee shall have the right to a jury trial on the issue of just and adequate compensation before the superior court having jurisdiction over the property sought to be condemned during the next term of court following the vesting of title in the condemnor. This right to a jury trial at the next term of court may be waived by the condemnee.

History. — Ga. L. 1957, p. 387, § 14; Ga. L. 1998, p. 1539, § 7; Ga. L. 2006, p. 39, § 13/HB 1313.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008). For survey article on real property law, see 67 Mercer L. Rev. 193 (2015).

JUDICIAL DECISIONS

This section provides for appeal from award of master to superior court when the issue as to the value of the property shall be tried by a jury. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Appeal in superior court only method of correcting special master's errors. — The only method of correcting any errors the assessors or a special master may have made in the original hearing and award is not by recommittal to that body but by an appeal in the superior court, which begins again the process of adjudication. City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975); Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817, cert. denied, 186 Ga. App. 919, 367 S.E.2d 817 (1988).

If an appeal is taken by any party to a jury, the trial judge commits error in remanding the case to the special master. The trial judge should rule on all legal issues, either by pretrial order or during the course of the trial, in the jury case pending before the judge. Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976); Walker v. Georgia Power Co., 177 Ga. App. 493, 339 S.E.2d 728 (1986).

The trial judge erred when the judge determined that the judge was not going to conduct the proceedings de novo but instead decided to review the decision of the special master on nonvalue issues as though occupying an appellate position in the proceedings, thereby addressing only whether there was any evidence to support the special master's findings of fact and whether there were any errors of law in the special master's conclusions of law. Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817, cert. denied, 186 Ga. App. 919, 367 S.E.2d 817 (1988).

Ga. L. 1957, p. 387, § 14 (see O.C.G.A. § 22-2-112) was copied from former

Code 1933, § 36-601 (see O.C.G.A. § 22-2-80) and consequently had the same meaning. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Ga. L. 1957, p. 387, § 14 (see O.C.G.A. § 22-2-112) and former Code 1933, § 36-601 (see O.C.G.A. § 22-2-80) must be given the same meaning. Both provide that appeals must be in writing and filed in the superior court of the county where the award is filed and within ten days thereof. City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Payment of award not prerequisite to filing appeal. — Payment of the amount of the award of the special master into the registry of the court is not a prerequisite to filing an appeal for a jury trial. Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983).

Ten-day period also applies to nonvalue issues. — In order to comply with due process requirements, the ten days in which to file exception to value issues under O.C.G.A. § 22-2-112 applies to nonvalue issues as well. Sims v. City of Toccoa, 256 Ga. 368, 349 S.E.2d 385 (1986).

Appeal to superior court not timely filed when condemnee fails to follow procedure for making objections known. — When the condemnee fails to follow the procedure required by law in condemnation in rem proceedings before a special master in seeking to have the condemnee's objections made known to the court and to the special master, the superior court may rule that the condemnee's appeal to the superior court from the award of the special master was not timely filed. Hendley v. Housing Auth., 160 Ga. App. 221, 286 S.E.2d 463 (1981).

Award becomes final if appeal not filed within ten days. — If an appeal to a jury is desired it must be filed within ten days after the filing of the award or it becomes final. Hardy v. Georgia Power Co., 151 Ga. App. 805, 261 S.E.2d 748 (1979).

No exception to ten-day period for appeal. — O.C.G.A. § 22-2-112 does not set forth any exception to the ten-day period, and the right to file an appeal extended to exceptions taken to an amended award not substantively changing an original award. Stafford v. Bryan County Bd. of Educ., 267 Ga. 274, 476 S.E.2d 727 (1996).

Entry of judgment on award prior to expiration of ten-day period. — Because all conditions and limitations provided by the Special Master's Act must be strictly followed, a superior court's entry of judgment on an award prior to the expiration of the ten-day period is reversible error absent an acquiescence or waiver. Fowler v. City of Warm Springs, 238 Ga. App. 601, 519 S.E.2d 703 (1999).

Former Code 1933, § 6-102 (see O.C.G.A. § 5-3-20) did not extend time for filing notice of appeal specified in Ga. L. 1957, p. 387, § 14 (see O.C.G.A. § 22-2-112). City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Appeal to superior court is de novo proceeding. — If an appeal is taken pursuant to this section to a jury in the superior court, the trial in the superior court is a de novo proceeding, and it is the duty of the trial judge, by pretrial order or during the course of the trial, to rule on all legal issues. Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976).

An appeal by either party from the award of a special master is a de novo proceeding. Accordingly, if the case is tried again and the jury reaches a verdict smaller than the prepaid special master's award, the payor would be entitled to a judgment against the payee for the difference. Chastain v. Fayette County, 221 Ga. App. 118, 470 S.E.2d 513 (1996).

Sole question on appeal is amount of compensation. — The sole question to be passed upon by the assessors, or a jury in the superior court on appeal, is the amount of compensation to be paid. Whether the quantity of land sought to be taken is necessary and proper for the purpose for which it is sought is a question not involved in such a proceeding. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

When an appeal is taken from a special master's award to a jury in the superior court pursuant to this section, the only

issue for decision by the jury is the value of the subject property taken. Taylor v. Taylor County, 231 Ga. 209, 200 S.E.2d 887 (1973).

While all issues may be raised in an appeal from the special master's award, the question of value is the sole issue to be submitted to the jury, and its fact-finding powers are limited to those facts directly touching on value. Walker v. Georgia Power Co., 177 Ga. App. 493, 339 S.E.2d 728 (1986).

What O.C.G.A. §§ 22-2-112 and 22-2-114 make very clear is that the court, and not the jury on appeal, will decide the quantity of interest of each condemnee and will also decide the quality of such interest. Walker v. Georgia Power Co., 177 Ga. App. 493, 339 S.E.2d 728 (1986).

Trial court properly denied condemnees' motion for jury trial "on all issues of law and fact" upon appeal from an award by a special master when the sole jury question was the amount of the compensation award. Benton v. Georgia Marble Co., 258 Ga. 58, 365 S.E.2d 413 (1988).

Exceptions to special master's rulings on issues of law. — If an appeal to a jury in the superior court is not taken by one of the parties pursuant to this section, then exceptions to the rulings on issues of law made by the special master must be timely filed and presented to the trial judge for decision. Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976).

One who does not except to the findings of the special master or appeal from the judgment of condemnation cannot, on the usual appeal to a jury on the question of value, raise legal issues by way of counterclaim or motion. Roberts v. Wise, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

Special master's findings as to amount company was entitled to under condemnation proceeding were determinations of law; therefore, a jury trial under O.C.G.A. § 22-2-112 was an inappropriate method of appealing, and the company's failure to take exception to the findings acted as a waiver of its right to appeal. Big-Bin Dispos-All, Inc. v. City of Valdosta, 172 Ga. App. 746, 324 S.E.2d 501 (1984).

The failure of a party to file exceptions to the master's award for determination by the superior court results in a waiver of the party's right to further litigate any nonvalue issues. Beck v. Cobb County, 180 Ga. App. 808, 350 S.E.2d 818 (1986).

Since the condemnor never filed an exception to the special master's award concerning the requirement that it give the landowner advance notice of its entry onto the easement in non-emergency situations, and the superior court made the special master's award the judgment of the court, the trial court was correct when it determined that the notice provision was a viable portion of the condemnation judgment. Styers v. Atlanta Gas Light Co., 263 Ga. 856, 439 S.E.2d 640 (1994).

Trial court properly refused to dismiss a landowner's appeal on grounds that it failed to express dissatisfaction with the compensation awarded by the special master, as it provided the utility with notice that the landowner was objecting to the valuation given on the property; moreover, in light of the interest that the utility acquired in the property, and the purposes for which it intended to use that property, consequential damages potentially represented a significant portion of the compensation the landowner could recover. Ga. Power Co. v. Stowers, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

Condemnation of a property owner's land by a city was upheld on appeal, as was the trial court's judgment entered upon a jury verdict in the amount of $63,361 for the property and an award of attorney fees to the city, because the property owner never challenged the valuation made by a special master and also removed the amount awarded from the registry, thereby estopping the owner from challenging the legality of the taking on appeal. Mayo v. City of Stockbridge, 285 Ga. App. 58, 646 S.E.2d 79 (2007), cert. denied, No. S07C1279, 2007 Ga. LEXIS 707 (Ga. 2007).

Right to jury trial on appeal does not extend to nonvalue issues. — The right of the condemnees to appeal the award of the special master to a jury trial does not carry with it the right to have a jury trial on the other issues in the case. Leach v. Georgia Power Co., 228 Ga. 16, 183 S.E.2d 755 (1971).

Trial court erred in jury instructions. — In a business's appeal of a spe-

cial master's award of $5,000 for the loss of its business operation due to condemnation of the building it occupied and its challenge to a trial court judgment finding that it lacked a compensable business loss, that judgment was reversed because the trial court erred in its instruction to the jury on the uniqueness test by incorrectly stating that difficulty relocating the business in the same general area was not a test for uniqueness. Further, the trial court erred by instructing the jury not to consider evidence of the business's difficulty in relocating to a comparable site in the area. ABM Realty Co. v. Bd. of Regents, 296 Ga. App. 658, 675 S.E.2d 549 (2009).

Finality of special master's judgment during pendency of appeal. — When an appeal to a jury as to value was pending, the judgment of condemnation under the special master's condemnation procedure was not a final judgment subject to review in the absence of a certificate as provided for by former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34). City of Atlanta v. Turner Adv. Co., 234 Ga. 1, 214 S.E.2d 501 (1975).

When property is condemned and the judgment provides that no compensation is to be paid by the condemnor, there is no question to be presented to a jury as to value, and such judgment is final and subject to review without a certificate. City of Atlanta v. Turner Adv. Co., 234 Ga. 1, 214 S.E.2d 501 (1975).

Market value is generally measure of damages. — The general rule is that the measure of damages, excluding the question of consequential damages and benefits, is the market value of the property taken. State Hwy. Dep't v. Stewart, 104 Ga. App. 178, 121 S.E.2d 278 (1961).

Just and adequate compensation does not necessarily restrict recovery to market value when, by reason of special factors, the pecuniary value of the property to the owner is for some reason not the same as the actual cash market value. State Hwy. Dep't v. Stewart, 104 Ga. App. 178, 121 S.E.2d 278 (1961).

Market value defined. — The market value of property is what a person who does not have to sell is willing to take from a person who is willing to buy but does not have to buy. State Hwy. Dep't v. Stewart, 104 Ga. App. 178, 121 S.E.2d 278 (1961).

Consideration of market value of land for any purpose. — In determining the value of the land, the jury must consider the market value of the property for any purpose for which the land is suitable or the land is adapted. State Hwy. Dep't v. Stewart, 104 Ga. App. 178, 121 S.E.2d 278 (1961).

No bad faith shown on part of county. — Record supported that the condemnation of the buffer property would serve a public purpose and that the county did not act in bad faith because failing to disclose the extent of methane migration provided no financial benefit for the county since at no time did the county discount the price the county was offering the property owner for the buffer property due to ignorance of the status of methane migration. Morgan County v. Gay, 352 Ga. App. 555, 834 S.E.2d 576 (2019), cert. denied, No. S20C0331, 2020 Ga. LEXIS 380 (Ga. 2020); cert. denied, No. S20C0495, 2020 Ga. LEXIS 390 (Ga. 2020); cert. denied, No. S20C0332, 2020 Ga. LEXIS 398 (Ga. 2020).

Consequential damages resulting from rentals lost before actual taking. — After a judgment that a taking is complete, a condemnee may appeal to a jury under this section as to the consequential damages resulting from lost rentals during the period between the announcement of the intent to condemn and date for actual taking. Such an appeal is de novo as to the value of property taken or amount of damage done. R.E. Adams Properties, Inc. v. City of Gainesville, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Appeal governed by rules applicable to ordinary suits. — The trial of an appeal from the award of the special master in the superior court, which is a de novo investigation, is a judicial proceeding governed by the rules applicable to ordinary suits in the jurisdiction. City of Gainesville v. Loggins, 116 Ga. App. 548, 158 S.E.2d 287 (1967), rev'd on other grounds, 224 Ga. 114, 160 S.E.2d 374 (1968).

Dismissal of appeal filed more than ten days after award. — When, in a condemnation action, an appeal to a jury

in superior court is filed more than ten days after the filing of the award of a special master, it is error for a trial court not to dismiss the appeal. Howell Enters., Inc. v. City of Atlanta, 123 Ga. App. 767, 182 S.E.2d 331 (1971).

An appeal not filed within the prescribed ten-day period is not timely and the proper judgment is one of dismissal. City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975); Williams v. Macon-Bibb County Water & Sewerage Auth., 202 Ga. App. 549, 414 S.E.2d 909 (1992).

When property owner's appeal to jury was untimely because it was not filed within ten days of the filing of the special master's award, the owner's earlier demand for jury trial, filed before a special master award existed, did not qualify as a timely appeal to the jury, and inasmuch as no appeal to the jury was filed after the award was made and within ten days after the award was filed, the county's motion to dismiss the appeal was granted. Gwinnett County v. Grant, 181 Ga. App. 304, 352 S.E.2d 391 (1986).

The circumstances of a condemnation proceeding under the Special Master Act, O.C.G.A. § 22-2-112, prior to the 2006 amendment to that statute, include the fact that neither the special master nor the court are obligated to serve the parties with the award, and as a result a party has a duty to exercise diligence in determining when the award was filed; in such a situation, due diligence requires more than relying solely on a third party to provide information that could be obtained directly from the court. Rutland v. Ga. Power Co., 286 Ga. App. 14, 648 S.E.2d 436 (2007).

As written, O.C.G.A. § 22-2-112 sets forth no exceptions to the ten day period to file an appeal from the date an award is filed with the superior court, and an appeal not filed within that ten day period is not timely and the proper judgment is one of dismissal. Rutland v. Ga. Power Co., 286 Ga. App. 14, 648 S.E.2d 436 (2007).

Payment of special master's award as condition precedent to appeal. — A condemnor is not required to pay the award of the special master into the registry of the court within ten days after the filing of the award, or at the time of, or prior to the filing of the appeal as a condition precedent to its right of appeal. Arnold v. State Hwy. Dep't, 116 Ga. App. 201, 156 S.E.2d 469 (1967).

Payment of amount of verdict as condition precedent to appeal. — Under the constitutional mandate that private property cannot be taken or damaged for public use without first paying just and adequate compensation to the owner, the payment of the amount of a jury verdict in excess of the prior appraisal by assessors, or special master, is a condition precedent to a valid appeal from such verdict and the judgment based thereon. City of Gainesville v. Loggins, 224 Ga. 114, 160 S.E.2d 374 (1968).

The payment of the amount of the jury verdict in excess of the prior appraisal by assessors, or special master, is a condition precedent to the condemnor seeking a second de novo jury trial. Paulk v. Georgia Power Co., 231 Ga. 721, 204 S.E.2d 154 (1974).

Tender of award to condemnee not condition precedent to condemnor's appeal. — When a proceeding in rem is brought to condemn property for a public use, tender of the amount awarded by the special master to the apparent or ostensible owner of such property is not a condition precedent to the condemnor's right to pay the award into the registry of the court and enter an appeal to a jury. Hunt v. State Hwy. Dep't, 101 Ga. App. 797, 115 S.E.2d 384 (1960); Tillman v. State Hwy. Dep't, 101 Ga. App. 865, 115 S.E.2d 459 (1960); Slocumb v. Housing Auth., 101 Ga. App. 765, 115 S.E.2d 459 (1960); State Hwy. Dep't v. Taylor, 102 Ga. App. 15, 115 S.E.2d 703 (1960); State Hwy. Dep't v. Farmers Gin Co., 102 Ga. App. 35, 115 S.E.2d 760 (1960).

Entry of judgment when appeal results in lower award. — When a special master makes an award to a condemnee, who subsequently is granted a jury trial on appeal which results in a lower award, the judgment should be entered even though the condemnor never appealed the award of the special master because an appeal by either party entitles both parties to a de novo determination of the issue. Smith v. Georgia Power Co., 131 Ga. App. 380, 205 S.E.2d 916 (1974).

Refusal by clerk of superior court to pay over amount awarded to condemnee which had been paid to such clerk by the condemnor in connection with its appeal for a jury trial is not a proper ground for dismissal of such appeal because when the condemnor pays the amount of the award of the assessors into the registry of the court, the condemnor is not thereafter concerned with its distribution, and, further, such condemnor is not responsible for the clerk's actions. State Hwy. Dep't v. Taylor, 102 Ga. App. 15, 115 S.E.2d 703 (1960).

Payment of award by delivery of check. — The delivery of a check, in the amount of the condemnation award, to the clerk of the superior court is not payment of such amount into the registry of the court when sufficient funds to cover such check are not on deposit at the bank on which such check is drawn during the ten day period when an appeal may be filed. State Hwy. Dep't v. Farmers Gin Co., 102 Ga. App. 35, 115 S.E.2d 760 (1960).

When jury is unable to agree on whether condemnee is entitled to recover expenses of litigation, including attorney fees, the trial court is not authorized to grant the condemnee's motion for judgment notwithstanding the mistrial. DOT v. Glenn, 243 Ga. 21, 252 S.E.2d 906 (1979).

Trial court serves as trier of fact on nonvalue issues. — There being no right to a jury trial on exceptions to the special master's rulings on nonvalue issues, the trial court sits as the trier of fact and its judgment will not be disturbed if there is any evidence in the record to sustain it. Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983).

Evidentiary hearing not required. — On appeal from a special master's award, the court was not required to conduct an evidentiary hearing on non-value issues because that would allow new evidence which was not before the special master or a repetition of evidence which should have been preserved by transcript. Simmons v. Webster County, 225 Ga. App. 830, 485 S.E.2d 501 (1997), cert. denied, 522 U.S. 1110, 118 S. Ct. 1041, 140 L. Ed. 2d 106 (1998).

Cited in Georgia S. & Fla. Ry. v. City of Warner Robins, 107 Ga. App. 370, 130 S.E.2d 151 (1963); Housing Auth. v. Baker, 119 Ga. App. 109, 166 S.E.2d 437 (1969); Wiggins v. City of Macon, 120 Ga. App. 197, 169 S.E.2d 667 (1969); Wilson v. City of Waycross, 130 Ga. App. 253, 203 S.E.2d 301 (1973); Sweat v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384 (1975); Glynn County v. Victor, 143 Ga. App. 198, 237 S.E.2d 701 (1977); Shoemaker v. Department of Transp., 240 Ga. 573, 241 S.E.2d 820 (1978); DeKalb County v. Trustees, Decatur Lodge No. 1602, B.P.O. Elks, 145 Ga. App. 180, 243 S.E.2d 284 (1978); Oglethorpe Power Corp. v. Seasholtz, 157 Ga. App. 723, 278 S.E.2d 429 (1981); Turner v. City of Nashville, 167 Ga. App. 665, 307 S.E.2d 74 (1983); Metropolitan Atlanta Rapid Transit Auth. v. Gould Investors Trust, 169 Ga. App. 303, 312 S.E.2d 629 (1983); Stafford v. Bryan County Bd. of Educ., 219 Ga. App. 750, 466 S.E.2d 637 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appellate Review, §§ 77 et seq., 189. 26 Am. Jur. 2d, Eminent Domain, §§ 6, 112 et seq. 27 Am. Jur. 2d, Eminent Domain, §§ 485 et seq., 637, 869 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 396 et seq.

ALR. — Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 A.L.R.2d 346.

22-2-113. Prosecution of appeals; effect of discrepancy between award of special master and verdict of jury; issuance of execution upon award or judgment.

(a) The tender, payment, or acceptance of the amount of the award shall not prevent any party from prosecuting the appeal.

(b) Where separate and distinct parcels of property are condemned in the same proceeding, the owner of any separate and distinct property may file a separate appeal to a jury in the superior court.

(c) If the amount awarded by the special master or the special master panel, if such a panel exists, is less than that found by the verdict of the jury, the condemnor shall be bound to pay the sum so finally adjudged less the amount previously deposited as provided in Code Section 22-2-110 plus lawful interest on the difference from the date of such deposit, in order to retain the property.

(d) If the condemnor fails to pay the amount of the award or judgment within ten days after the same is filed or entered, then the clerk shall issue execution upon such award or judgment which may be levied upon any property of the condemnor.

History. — Ga. L. 1957, p. 387, § 15; Ga. L. 1998, p. 1539, § 8.

Law reviews. — For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981).

JUDICIAL DECISIONS

Judgment authorized by this section is clearly in personam judgment. Atlanta Whses., Inc. v. Housing Auth., 143 Ga. App. 588, 239 S.E.2d 387 (1977).

Condemnor cannot insist upon its right to take property and refuse to pay the amount awarded to the condemnee at the same time. State Hwy. Dep't v. Taylor, 102 Ga. App. 15, 115 S.E.2d 703 (1960).

One cannot voluntarily accept money awarded for one's property and still contest right to condemn, but such acceptance in no way precludes one from protesting the value amount of the award. Tingle v. Georgia Power Co., 150 Ga. App. 867, 258 S.E.2d 668 (1979).

Despite the fact that subsection (a) of O.C.G.A. § 22-2-113 states that the acceptance of the award "shall not prevent any party from prosecuting the appeal," this language is not applicable to appeals in which the condemnee challenges the right to condemn, as opposed to the amount of the award. Wrege v. Cobb County, 203 Ga. App. 241, 416 S.E.2d 562 (1992).

Award becomes final if appeal not filed within ten days. — If an appeal to a jury is desired it must be filed within ten days after the filing of the award or it becomes final. Hardy v. Georgia Power Co., 151 Ga. App. 805, 261 S.E.2d 748 (1979).

"Owner" intended to be distinguished from other condemnees. — It is obvious that the General Assembly in using the word "owner" not only intended it to have its ordinary signification, but in doing so, also distinguished the owner from other condemnees. Citizens & S. Nat'l Bank v. Fulton County, 123 Ga. App. 323, 180 S.E.2d 905 (1971).

Leaseholder is "owner" within the meaning of this section. Allen v. Hall County, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

Bank as lienholder is not "owner" within the meaning of the statute as to the

money received by it under the order of the court and the agreement of the parties. Citizens & S. Nat'l Bank v. Fulton County, 123 Ga. App. 323, 180 S.E.2d 905 (1971).

Applicability of section. — The provisions of subsection (a) of O.C.G.A. § 22-2-113 were not applicable when the condemnees withdrew their original appeal with prejudice; further, the statutory language is not applicable to appeals in which the condemnee challenges the right to condemn as opposed to challenging the amount of the award. Fulton County v. Threatt, 210 Ga. App. 269, 435 S.E.2d 672 (1993).

Judgment in condemnation action may be pled in bar of subsequent damage suit. R.E. Adams Properties, Inc. v. City of Gainesville, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Computation of interest. — When interest is computed on an amount which the condemnee must refund to the condemnor, interest is computed only from the date of the adjudication of principal amount. State Hwy. Dep't v. Rogers, 118 Ga. App. 626, 165 S.E.2d 172 (1968).

In a condemnation proceeding, the trial court erred in failing to follow the mandates of O.C.G.A. § 22-2-113(c) which required the payment of interest from the date of the taking on the difference between the special master's award and the arbitrator's award. Threatt v. Forsyth County, 250 Ga. App. 838, 552 S.E.2d 123 (2001).

Interest accrues at rate of seven percent. — The 12 percent rate of O.C.G.A. § 7-4-12 applies only to judgments; any interest accruing under O.C.G.A. § 22-2-113 for that period of time following the award of the special master until the jury verdict and entry of a final judgment is to be at the legal interest rate established by § 7-4-2, such rate being seven percent per annum. City of Atlanta v. Wright, 159 Ga. App. 809, 285 S.E.2d 250 (1981).

Payment of amount of verdict as condition precedent to appeal. — The payment of the amount of the jury verdict in excess of the prior appraisal by assessors, or special master, is a condition precedent to the condemnor seeking a second de novo jury trial. Georgia Power Co. v. Paulk, 131 Ga. App. 218, 205 S.E.2d 484 (1974).

Tender of award to condemnee not condition precedent to condemnor's appeal. — When a proceeding in rem is brought to condemn property for a public use, tender of the amount awarded by the special master to the apparent or ostensible owner of such property is not a condition precedent to the condemnor's right to pay the award into the registry of the court and enter an appeal to a jury. Hunt v. State Hwy. Dep't, 101 Ga. App. 797, 115 S.E.2d 384 (1960); Tillman v. State Hwy. Dep't, 101 Ga. App. 865, 115 S.E.2d 459 (1960); Slocumb v. Housing Auth., 101 Ga. App. 765, 115 S.E.2d 459 (1960); State Hwy. Dep't v. Taylor, 102 Ga. App. 15, 115 S.E.2d 703 (1960); State Hwy. Dep't v. Farmers Gin Co., 102 Ga. App. 35, 115 S.E.2d 760 (1960).

Refusal by clerk of superior court to pay over amount awarded to condemnee, which had been paid to such clerk by the condemnor in connection with its appeal for a jury trial is not a proper ground for dismissal of such appeal because when the condemnor pays the amount of the award of the assessors into the registry of the court, the condemnor is not thereafter concerned with its distribution, and, further, such condemnor is not responsible for the clerk's actions. State Hwy. Dep't v. Taylor, 102 Ga. App. 15, 115 S.E.2d 703 (1960).

Payment of award by delivery of check. — The delivery of a check, in the amount of condemnation award, to the clerk of the superior court is not payment of such amount into the registry of the court when sufficient funds to cover such check are not on deposit at the bank on which such check is drawn during the ten day period when an appeal may be filed. State Hwy. Dep't v. Farmers Gin Co., 102 Ga. App. 35, 115 S.E.2d 760 (1960).

Cited in City of Atlanta v. Lunsford, 105 Ga. App. 247, 124 S.E.2d 493 (1962); Golfland, Inc. v. Thomas, 107 Ga. App. 563, 130 S.E.2d 757 (1963); City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975); Threatt v. Forsyth County, 262 Ga. App. 186, 585 S.E.2d 159 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appellate Review, § 75 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 389 et seq.

ALR. — Right under constitutional provision against taking or damaging, to recover in other than an eminent domain proceeding, for consequential damages to property no part of which is taken, 20 A.L.R. 516.

Right to interest in condemnation proceedings during owner's retention of possession, 32 A.L.R. 98.

Condemnor's right, as against condemnee, to interest on excessive money deposited in court or paid to condemnee, 99 A.L.R.2d 886.

22-2-114. Effect of deposit of award into court registry; conflicting claims as to deposit.

When the condemnor has paid into the registry of the court the amount provided for in the award of the special master or the special master panel, if such a panel exists, for the use and benefit of and subject to the demands of the condemnees, the effect of such payment into the registry of the court shall be the same as if paid to the condemnees directly, provided that the clerk shall pay out the money to the condemnees or their personal representatives upon proper proof submitted to him or her as to the quantity of their interests. Where there are conflicting claims, the clerk may require the conflicting parties to establish their claims before the court as is provided by law in other similar matters.

History. — Ga. L. 1957, p. 387, § 16; Ga. L. 1998, p. 1539, § 9.

JUDICIAL DECISIONS

This section requires payment into registry of court so that proper distribution can be made to all claimants of the fund. City of Gainesville v. Loggins, 224 Ga. 114, 160 S.E.2d 374 (1968).

Court, not jury on appeal, will decide quantity of interest of each condemnee. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

What §§ 22-2-112 and 22-2-114 make very clear is that the court, and not the jury on appeal, will decide the quantity of interest of each condemnee and will also decide the quality of such interest. Walker v. Georgia Power Co., 177 Ga. App. 493, 339 S.E.2d 728 (1986).

Burden is on one claiming entitlement to part of proceeds to make one's claim before the clerk. Roberts v. Wise, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

When one party holds condemnation proceeds in trust until conflicting claims can be resolved, this section may be applied in resolving those claims even though none of the condemnation fund is held in the registry of any court. Fourth Nat'l Bank v. Grant, 140 Ga. App. 78, 230 S.E.2d 60 (1976).

It is not error to fail to submit to jury question of apportionment of condemnation proceeds. Fourth Nat'l Bank v. Grant, 140 Ga. App. 78, 230 S.E.2d 60 (1976).

Consent order to pay funds directly to bank as lienholder is nothing more than an agreement among those asserting rights in the property as to the priority of

the bank. Citizens & S. Nat'l Bank v. Fulton County, 123 Ga. App. 323, 180 S.E.2d 905 (1971).

Opening case after judgment based on claim to portion of proceeds. — One who fails to file a proper claim or make a timely protest to the judgment may not, after many terms of court have intervened, open up the case on the sole ground that one is entitled to a portion of the proceeds. Roberts v. Wise, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

Cited in Golfland, Inc. v. Thomas, 107 Ga. App. 563, 130 S.E.2d 757 (1963); Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976); Glynn County v. Victor, 143 Ga. App. 198, 237 S.E.2d 701 (1977); Metropolitan Atlanta Rapid Transit Auth. v. Gould Investors Trust, 169 Ga. App. 303, 312 S.E.2d 629 (1983); Hart v. City of Hamilton, 173 Ga. App. 135, 325 S.E.2d 791 (1984); Benton v. Patel, 257 Ga. 669, 362 S.E.2d 217 (1987); Bankston v. City of Barnesville, 221 Ga. App. 446, 471 S.E.2d 543 (1996); White v. Ringgold Tel. Co., 334 Ga. App. 325, 779 S.E.2d 378 (2015).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 548 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 550 et seq.

ARTICLE 3

PROCEEDING BEFORE COURT

JUDICIAL DECISIONS

The purpose of this special condemnation statute is to afford a speedy and fair means whereby the public authorities may acquire a clear title to the lands sought for public purposes, and the landowner and all parties concerned may receive their just compensation therefor. Denham v. State Hwy. Bd., 52 Ga. App. 790, 184 S.E. 631 (1936).

The purpose and the mandatory requirement of Ga. L. 1914, p. 92, § 1 et seq. is for the condemnor to pay the amount of the award into the registry of the court so that it may be disbursed after a judgment has been taken against the property described in the petition and to those responding parties whom the judge, after hearing their respective claims thereto, finds to be justly entitled. Kreutz v. Housing Auth., 107 Ga. App. 315, 130 S.E.2d 134 (1963).

In proceeding under Ga. L. 1914, p. 92, § 1 et seq., speedy action and progress is to be obtained so far as possible, and the statutes providing therefor must be strictly pursued. Denham v. State Hwy. Bd., 52 Ga. App. 790, 184 S.E. 631 (1936).

Fact that State of Georgia is condemnor does not deprive condemnee of equal protection of law since the condemnee is authorized to make any valid defense in the condemnation proceeding itself. Russell v. Venable, 216 Ga. 137, 115 S.E.2d 103 (1960).

Ga. L. 1914, p. 92, § 1 et seq. is general law, and may be amended by another general law in accord with the state Constitution. Russell v. Venable, 216 Ga. 137, 115 S.E.2d 103 (1960).

Ga. L. 1914, p. 92, § 1 et seq. makes adequate provision for anyone claiming interest to assert equitable as well as legal rights to the property in the condemnation proceeding itself. Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961).

All legal and equitable issues relevant to the condemnation of a piece of land may be raised in a single proceeding, unless principles of waiver or estoppel apply. DeKalb County v. Jackson-Atlantic Co., 123 Ga. App. 695, 182 S.E.2d 160 (1971).

All matters in opposition to petition to condemn property must be filed in condemnation proceeding, when the petition is filed under the provisions of Ga. L. 1914, p. 92, § 1 et seq. Howard v.

Housing Auth., 220 Ga. 640, 140 S.E.2d 880 (1965).

Prior to enactment of Ga. L. 1914, p. 92, § 1 et seq., there were no pleadings in condemnation proceeding, and no hearings provided for before the presiding judge prior to appeal; questions pertaining to the right to condemn, the constitutionality of the proceedings, and similar questions, could be made by the condemnee only in a separate bill in equity. Martin v. Fulton County, 213 Ga. 761, 101 S.E.2d 716 (1958).

Constitutionality of statute may be questioned in separate equity proceeding. — When the condemnee contends that the proceedings were brought under an unconstitutional statute, the validity of the statute may be called in question under a separate proceeding in equity. Martin v. Fulton County, 213 Ga. 761, 101 S.E.2d 716 (1958).

Injunction available when remedy at law not adequate. — In condemnation proceedings under Ga. L. 1914, p. 92, § 1 et seq., a bill for injunction will lie when the remedy at law is not adequate and complete. Martin v. Fulton County, 213 Ga. 761, 101 S.E.2d 716 (1958).

Equitable defenses and pleadings may be filed in condemnation proceedings. — While it has been held that a separate petition in equity for injunction may, in certain instances, be brought to restrain a condemnation proceeding filed under this chapter, it does not necessarily follow that equitable defenses and equitable pleadings may not be filed in such a condemnation proceeding, as in other actions at law. Martin v. Fulton County, 213 Ga. 761, 101 S.E.2d 716 (1958).

Use and review of motions to dismiss. — Former Code 1933, § 36-1106 (see O.C.G.A. § 22-2-132) specifically provides the nature and character of the objections which may be urged before the presiding judge, which include "any other matters material to their respective rights"; matters pertaining to the rights of the condemnee might therefore be raised by general and special demurrers (now motions to dismiss) as in other cases, and an adverse ruling on a general demurrer (now motion to dismiss) can be reviewed by a direct bill of exceptions prior to any final judgment in the condemnation case. Martin v. Fulton County, 213 Ga. 761, 101 S.E.2d 716 (1958).

Ga. L. 1914, p. 92, § 1 et seq. does not provide for any method of review of interlocutory orders, and the only final judgment in this proceeding is the judgment of award. Stewart v. Board of Comm'rs, 66 Ga. App. 108, 17 S.E.2d 203 (1941).

Condemnee cannot halt proceedings at any stage before appointment of assessors and award by interposing a demurrer to the petition filed by the condemnor. Denham v. State Hwy. Bd., 52 Ga. App. 790, 184 S.E. 631 (1936).

Former Code 1933, § 6-503 applicable to appeals in condemnation proceedings. — The provisions of former Code 1933, § 6-503 (see O.C.G.A. § 5-3-8) required the consent of the opposite party before an appeal may be dismissed, were applicable to appeals in condemnation proceedings instituted under Ga. L. 1914, p. 92, § 1 et seq. State Hwy. Dep't v. Blalock, 98 Ga. App. 630, 106 S.E.2d 552 (1958).

Issue of whether condemnee intends to dedicate land to public use is an issue that the trial judge should rule on in a pretrial order. DeKalb County v. Jackson-Atlantic Co., 123 Ga. App. 695, 182 S.E.2d 160 (1971).

Whether a condemnee dedicated a large portion of the land to public use is a mixed question of law and fact concerning the nature and amount of the land in issue, and its determination is for the trial judge. DeKalb County v. Jackson-Atlantic Co., 123 Ga. App. 695, 182 S.E.2d 160 (1971).

When there is no express dedication for public use and the requisite intent must be implied, the acts relied upon to establish such dedication must be such as clearly showed a purpose on the part of the owner to abandon the owner's own personal dominion over such property, and to devote the property to a definite public use. DeKalb County v. Jackson-Atlantic Co., 123 Ga. App. 695, 182 S.E.2d 160 (1971).

When condemnor pays award of assessors into registry of court, the condemnor is not thereafter concerned with

the award's distribution. Kreutz v. Housing Auth., 107 Ga. App. 315, 130 S.E.2d 134 (1963).

Tender of award to owner not condition precedent to condemnor's appeal. — When a proceeding in rem is brought to condemn property for a public use under the provisions of Ga. L. 1914, p. 92, § 1 et seq., tender of the amount awarded by the assessors to the apparent or ostensible owner of such property is not a condition precedent to the condemnor's right to pay the award into the registry of the court and enter an appeal to a jury. State Hwy. Dep't v. Farmers Gin Co., 216 Ga. 70, 114 S.E.2d 537, answer conformed to, 102 Ga. App. 35, 115 S.E.2d 760 (1960).

Question of value is sole issue for jury on appeal. — While all issues may be raised in an appeal from the assessors' award, the question of value is the sole issue to be submitted to the jury, and its fact-finding powers are limited to those facts directly touching on value. DeKalb County v. Jackson-Atlantic Co., 123 Ga. App. 695, 182 S.E.2d 160 (1971).

Motion to dismiss appeal in condemnation proceedings under Ga. L. 1914, p. 92, § 1 et seq., which was regulated by former Code 1933, § 36-601 et seq. (see O.C.G.A. § 22-2-130 et seq.), fell in a different category from an oral motion to strike pleadings, amendments, or answers, since the motion to dismiss the appeal raised issues of fact. Murray v. State Hwy. Dep't, 103 Ga. App. 517, 120 S.E.2d 48 (1961).

Ruling on oral motion to strike motion to dismiss. — Trial court, in passing upon an oral motion to strike and dismiss the motion to dismiss an appeal in condemnation proceedings, can consider the evidence. Murray v. State Hwy. Dep't, 103 Ga. App. 517, 120 S.E.2d 48 (1961).

OPINIONS OF THE ATTORNEY GENERAL

Date of taking is date of special master's or assessor's award. 1970 Op. Att'y Gen. No. 70-116.

State Highway Department (now Department of Transportation) has authority to condemn private property to construct sidewalks, curbs and gutters, and the department has authority to condemn private property for any and all necessary drainage ditches in connection with the construction and maintenance of any road or highway on the State Highway System. 1950-51 Op. Att'y Gen. p. 432.

RESEARCH REFERENCES

ALR. — Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 A.L.R. 676.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 A.L.R. 679.

Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 A.L.R.2d 724.

Right to open and close argument in trial of condemnation proceedings, 73 A.L.R.2d 613.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 A.L.R.3d 1293.

Condemned property's location in relation to proposed site of building complex or similar improvement as factor in fixing compensation, 51 A.L.R.3d 1050.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific cover, 26 A.L.R.4th 68.

22-2-130. Authority to petition superior court for judgment in rem; applicability to acquisition of public property.

(a) Whenever the government of the State of Georgia, the United States government, or any person having the privilege of exercising the right of eminent domain desires to take or damage private property in pursuance of any law so authorizing and finds or believes that the title of the apparent or presumptive owner of such property is defective, doubtful, incomplete, or in controversy or that there are or may be unknown persons or nonresidents who have or may have some claim or demand thereon or some actual or contingent interest or estate therein or that there are minors or persons under disability who are or may be interested therein or that there are taxes due or that should be paid thereon or concludes for any reason that it is desirable to have a judicial ascertainment of any question connected with the matter, such government or person may, through any authorized representative, petition the superior court of the county having jurisdiction for a judgment in rem against the property or interest, condemning the same to the use of the petitioner upon payment of just and adequate compensation therefor to the person or persons entitled to such payment.

(b) Notwithstanding the provisions of subsection (a) of this Code section, the provisions of this article shall also apply to the acquisition of public property or an interest therein by condemnation and the power of eminent domain. As used in this subsection, the term "public property" has the meaning provided for in Code Section 50-16-180.

History. — Ga. L. 1914, p. 92, § 1; Code 1933, § 36-1104; Ga. L. 1937-38, Ex. Sess., p. 251, § 1; Ga. L. 1986, p. 1187, § 3.

JUDICIAL DECISIONS

Statute to be strictly construed. — In a statutory proceeding, when a person may be deprived of property, the statute must be strictly construed. Marist Soc'y v. City of Atlanta, 212 Ga. 115, 90 S.E.2d 564 (1955).

Government property not "private property." — "Private property" does not include property owned by a government or a governmental entity. DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

Department of Transportation may not condemn municipally owned property as the legislature has not clearly granted such authority or created a procedure therefore, and as such grant may not be implied from statutory provisions generally establishing a procedure for state agencies to condemn "private property." DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

Ga. L. 1914, p. 92, § 1 et seq. authorizes condemnation of lands in fee simple. Marist Soc'y v. City of Atlanta, 212 Ga. 115, 90 S.E.2d 564 (1955).

Effect of 1937-1938 amendment. — The 1937-1938 amendment to this section permits counties to condemn land by petition under the provisions of Ga. L. 1914, p. 92, § 1 et seq. Hoch v. Candler, 190 Ga. 390, 9 S.E.2d 622 (1940).

Under the 1937-1938 amendment to this section, it is not necessary that the condemnation petition allege an unsuccessful effort to procure the land by contract or a failure to agree as to compensa-

tion. Hoch v. Candler, 190 Ga. 390, 9 S.E.2d 622 (1940).

Prior negotiations to procure land from owner by contract are not necessary in a proceeding brought under this section. St. Clair v. State Hwy. Bd., 45 Ga. App. 488, 165 S.E. 297 (1932).

Venue of in rem proceeding is in county in which land lies; but if the tract of land lies in two counties, such proceeding can be brought in the superior court of either county. Cook v. State Hwy. Bd., 162 Ga. 84, 132 S.E. 902 (1926).

Persons claiming interest must establish amount and character of interest. — It is the duty of persons claiming an interest in property sought to be condemned to establish the amount and character of the interest claimed, and in such a proceeding all interests may be condemned, whether acquired by easement or by fee simple title to the property. Marist Soc'y v. City of Atlanta, 212 Ga. 115, 90 S.E.2d 564 (1955).

Relief for owners of remainder interest not made parties to in rem condemnation proceeding. — Owners of remainder interest in property who were not made parties to an in rem proceeding to condemn that property for a public purpose could obtain monetary relief for the value of their remaindermant but could not set aside the judgment of condemnation awarding title to a public body. Nelson v. State, 254 Ga. 611, 331 S.E.2d 554 (1985).

Court may enjoin condemnor from taking possession of and entering upon land until the issues made by the petition and defensive pleadings have been determined. Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961).

Condemnor cannot just abandon condemnation proceeding. Marist Soc'y v. City of Atlanta, 212 Ga. 115, 90 S.E.2d 564 (1955).

Tender or payment of award is necessary before property may be taken or the work thereon commenced. Wilson v. State Hwy. Dep't, 85 Ga. App. 907, 70 S.E.2d 535 (1952).

When no motion for new trial is made and no exception taken to verdict and judgment following an appeal by the condemnor to the superior court, the land is condemned to public servitude subject only to payment of the amount of compensation fixed by the verdict and judgment. Harrison v. State Hwy. Dep't, 183 Ga. 290, 188 S.E. 445 (1936).

To vacate and set aside judgment for value of property condemned, affirmative action seeking to set aside judgment in favor of condemnor, and payment of all expenses and damages accrued to the condemnee, are essential. Marist Soc'y v. City of Atlanta, 212 Ga. 115, 90 S.E.2d 564 (1955).

County authorities may by petition condemn land for road which is about to become a part of the State Highway System. Hoch v. Candler, 190 Ga. 390, 9 S.E.2d 622 (1940).

Condemnation of right of way across two tracts in one proceeding. — Under this section, the state can, in one proceeding, condemn a right of way over two tracts of land, one owned by one of the plaintiffs and the other owned by both plaintiffs, the proceeding being one in rem and not against the individuals. In such a proceeding, all persons interested will be allotted the damages to which they are respectively entitled. Cook v. State Hwy. Bd., 162 Ga. 84, 132 S.E. 902 (1926).

The condemnor can, in one proceeding, condemn a right-of-way over several tracts of land owned by different persons. Marist Soc'y v. City of Atlanta, 212 Ga. 115, 90 S.E.2d 564 (1955).

Separate equitable petition to enjoin condemnation under section not possible. — Plaintiff's claim, that defendants' intentions in planning to condemn the plaintiff's property without public need and without the funds to pay for the property presented a threat of irreparable harm to the plaintiff in the future, was not cognizable under Georgia law because a separate equitable petition to enjoin a condemnation governed by O.C.G.A § 22-2-130 will not lie. Saffold v. Carter, 739 F. Supp. 1541 (S.D. Ga. 1990).

Insufficient description of condemned land in injunction petition. — Previous condemnation proceeding by petition of the county authorities was not subject to attack by the present injunction petition of the former landowner, as containing an insufficient description of the

condemned land, when the description in the former proceeding identified the property as being described in plans on file in the office of the road commissioner of the county, and when the petition neither denied the existence of such plans and description nor alleged any fact showing their insufficiency. Hoch v. Candler, 190 Ga. 390, 9 S.E.2d 622 (1940).

When charter of municipality requires adoption of valid ordinance as prerequisite to condemnation of private property, and such requirement is not complied with prior to the condemnation proceedings, the action will be enjoined. Marist Soc'y v. City of Atlanta, 212 Ga. 115, 90 S.E.2d 564 (1955).

Discretion of condemning body. — See Georgia Power Co. v. Bishop, 162 Ga. App. 122, 290 S.E.2d 328 (1982) (decided under Ga. L. 1957, p. 387).

Cited in State Hwy. Dep't v. H.G. Hastings Co., 187 Ga. 204, 199 S.E. 793 (1938); Stewart v. Board of Comm'rs, 66 Ga. App. 108, 17 S.E.2d 203 (1941); United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); Patterson v. State Hwy. Dep't, 201 Ga. 860, 41 S.E.2d 260 (1947); Cable v. State Hwy. Bd., 208 Ga. 593, 68 S.E.2d 564 (1952); City of Atlanta v. Wilson, 209 Ga. 527, 74 S.E.2d 455 (1953); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960); Cureton v. Cureton, 218 Ga. 88, 126 S.E.2d 666 (1962); State Hwy. Dep't v. Robinson, 107 Ga. App. 854, 131 S.E.2d 786 (1963); Varnadoe v. Housing Auth., 221 Ga. 467, 145 S.E.2d 493 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 548 et seq., 563 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, §§ 2 et seq., 30 et seq.

ALR. — Condemnation by de facto corporation, 44 A.L.R. 542.

Condemnation of public utility property for public utility purposes, 173 A.L.R. 1362.

22-2-131. Contents of petition.

(a) The petition referred to in Code Section 22-2-130 shall set forth:

(1) The facts showing the right to condemn;

(2) The property or interest to be taken or damaged;

(3) The names and residences of the persons whose property or interests are to be taken or otherwise affected, so far as known;

(4) A description of any unknown persons or classes of unknown persons whose rights in the property or interest are to be affected;

(5) Such other facts as are necessary for a full understanding of the cause;

(6) A statement setting forth the necessity to condemn the private property and describing the public use for which the condemnor seeks the property; and

(7) A prayer for such judgment of condemnation as may be proper and desired.

(b) If any of the persons referred to in this Code section are minors or under disability, the fact shall be stated.

History. — Ga. L. 1914, p. 92, § 2; Code 1933, § 36-1105; Ga. L. 2006, p. 39, § 14/HB 1313.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

JUDICIAL DECISIONS

It is not necessary that condemnation petition allege unsuccessful effort to procure land by contract or a failure to agree as to compensation. Hoch v. Candler, 190 Ga. 390, 9 S.E.2d 622 (1940).

When petition for condemnation as amended fully meets requirements of this section, the trial judge does not err in overruling a general demurrer (now motion to dismiss). Martin v. Fulton County, 213 Ga. 761, 101 S.E.2d 716 (1958).

Cited in United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 416 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, §§ 2 et seq., 6 et seq., 30 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 250 et seq., 317 et seq.

22-2-132. Order to appear; directions for notice and service thereof; attachment of process to petition; cause to proceed as in rem.

(a) Upon presentation of the petition, the presiding judge shall issue an order requiring the condemnor, the owner of the property or of any interest therein, and the representative of any owner to appear at a time and place named in the order and make known their objections if any, rights, or claims as to the value of the property or of their interest therein, and any other matters material to their respective rights; provided, however, that if the petition includes affidavits from known and located persons with a legal claim, stating that such condemnees do not oppose the condemnation, no hearing pursuant to this Code section shall be required.

(b) The day named in the order shall be as early as may be convenient but shall be no less than 20 days from the date of the petition, due regard being given to the necessities of notice.

(c) The order shall give appropriate directions for notice and the service thereof.

(d) It shall not be necessary to attach any other process to the petition except the order referred to in subsection (a) of this Code section, and the cause shall proceed as in rem.

History. — Ga. L. 1914, p. 92, § 3; Code 1933, § 36-1106; Ga. L. 2006, p. 39, § 15/HB 1313.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

JUDICIAL DECISIONS

This section specifically provides nature and character of objections which may be urged before the presiding judge, which include "any other matters material to their respective rights"; matters pertaining to the rights of the condemnee might therefore be raised by general and special demurrers as in other cases, and an adverse ruling on a general demurrer can be reviewed by a direct bill of exceptions prior to any final judgment in the condemnation case. Martin v. Fulton County, 213 Ga. 761, 101 S.E.2d 716 (1958).

Court may enjoin condemnor from taking possession of and entering upon land until the issues made by the petition and defensive pleadings have been determined. Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961).

Separate suit in equity to enjoin condemnation will not lie. — Since adequate and complete relief, equitable as well as legal, is afforded any person aggrieved by a condemnation proceeding brought under this article, a separate suit in equity will not lie to enjoin the condemnation proceeding or to contest the constitutionality of the condemnation act of 1914 under which condemnation is proceeding. Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961).

Cited in State Hwy. Dep't v. H.G. Hastings Co., 187 Ga. 204, 199 S.E. 793 (1938); United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 409 et seq., 433 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, §§ 2 et seq., 6 et seq., 241 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 306 et seq. 72 C.J.S., Process, §§ 1 et seq., 32 et seq.

22-2-133. Service of process generally.

All persons entitled to notice under the facts stated in the petition who are sui juris and within this state and whose residence is known shall be served by the sheriff with a copy of the petition and order as in other causes at law, unless such service is waived in writing. All other service shall be made in the method pointed out by Part 2 of Article 1 of

Chapter 2 of this title, and all persons so served shall be deemed parties to the cause.

History. — Ga. L. 1914, p. 92, § 3; Code 1933, § 36-1107.

JUDICIAL DECISIONS

Cited in United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 433 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, §§ 2 et seq., 6 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 306 et seq. 72 C.J.S., Process, §§ 1 et seq., 32 et seq.

22-2-134. Discretion of judge to cause additional notice or service to be given; notification of tax collector or tax commissioner.

In any cases where it seems to the presiding judge to be in the interest of justice and of more effective notice to cause additional notice or service to be given, it shall be within his discretion so to order. In such cases, the additional notice and service shall be made as ordered before the cause proceeds to final hearing. In cases where any taxes are alleged or supposed to be due or unpaid, the order shall direct that a separate notice to that effect be given the proper tax collector or tax commissioner.

History. — Ga. L. 1914, p. 92, § 3; Code 1933, § 36-1108.

JUDICIAL DECISIONS

Cited in United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960); Ware v. Henry County Water & Sewerage Auth., 258 Ga. App. 778, 575 S.E.2d 654 (2002).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, §§ 2 et seq., 6 et seq.

C.J.S. — 72 C.J.S., Process, §§ 1 et seq., 32 et seq.

22-2-135. Appointment of assessors; discretion of judge to have issues tried in first instance by jury.

On the day named in the order made pursuant to Code Section 22-2-132, or at any other time to which the hearing may be continued, the court, having first passed on and adjudged all questions touching service and notice, shall, after hearing from all persons responding and desiring to be heard, make such order as to the appointment of assessors as shall conform most nearly to Article 1 of this chapter and give all interested persons equal rights in the selection thereof. If, by reason of conflicting interests or otherwise, such equality of right cannot be preserved, the judge shall himself make such order on the subject as shall secure a fair and impartial assessment or may in his discretion order the issues tried in the first instance by a jury. In any event, it shall be within the power of the court to hear the cause as speedily as may be consistent with justice and due process of law.

History. — Ga. L. 1914, p. 92, § 4; Code 1933, § 36-1109.

JUDICIAL DECISIONS

Purpose of this special condemnation statute is to afford a speedy and fair means whereby the public authorities may acquire a clear title to the lands sought for public purposes, and the landowner and all parties concerned may receive their just compensation therefor. Denham v. State Hwy. Bd., 52 Ga. App. 790, 184 S.E. 631 (1936).

It is within judge's discretion to determine disposition of preliminaries in the proceeding. Denham v. State Hwy. Bd., 52 Ga. App. 790, 184 S.E. 631 (1936).

Cited in United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); Patterson v. State Hwy. Dep't, 201 Ga. 860, 41 S.E.2d 260 (1947); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960); State Hwy. Dep't v. Taylor, 102 Ga. App. 15, 115 S.E.2d 703 (1960); Housing Auth. v. Mercer, 123 Ga. App. 38, 179 S.E.2d 275 (1970); Fourth Nat'l Bank v. Grant, 140 Ga. App. 78, 230 S.E.2d 60 (1976).

OPINIONS OF THE ATTORNEY GENERAL

Award must be tendered or paid before condemnor can enter upon land. — The full sum awarded in any condemnation proceeding must be tendered to the condemnee, or paid into court in the event the condemnee refuses to accept payment, before the condemnor may enter upon, occupy, or subject the land to its use. 1967 Op. Att'y Gen. No. 67-108.

Prerequisite to appealing award. — It is not necessary for the agency bringing condemnation proceedings to place any appraised amount in trust prior to a court ruling; however, if assessors are appointed as provided in this section, the condemning authority cannot appeal the assessors' award without tender of the amount of the award to the condemnee or payment into the registry of the court. 1967 Op. Att'y Gen. No. 67-108.

Soil and water conservation district need not have funds on hand merely to institute condemnation proceeding. 1967 Op. Att'y Gen. No. 67-108.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 486 et seq., 492 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, §§ 2 et seq., 178 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 396 et seq.

ALR. — Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 A.L.R. 194.

Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

How to obtain jury trial in eminent domain: waiver, 12 A.L.R.3d 7.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 A.L.R.3d 1122.

22-2-136. Appeal from assessors' award.

In case assessors are appointed, the same right of appeal shall lie from their award to a jury in the superior court, as is provided in Part 5 of Article 1 of this chapter and upon like terms and conditions in all respects as are therein provided.

History. — Ga. L. 1914, p. 92, § 4; Code 1933, § 36-1110.

JUDICIAL DECISIONS

Appeal from condemnation award is de novo investigation. State Hwy. Dep't v. Hester, 112 Ga. App. 51, 143 S.E.2d 658 (1965).

Appeal from award of assessors to jury in superior court was not a suit within the provisions of former Code 1933, § 85-1802 (see O.C.G.A. § 44-12-21). State Hwy. Dep't v. Noble, 220 Ga. 410, 139 S.E.2d 318 (1964).

Appeal does not require any process as is required in all suits at law. State Hwy. Dep't v. Noble, 220 Ga. 410, 139 S.E.2d 318 (1964).

Requirement of payment of costs is for benefit of officers of court and not a condition precedent to the filing of an appeal. Hilderbrand v. Housing Auth., 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Clerk is not bound to receive appeal until costs have been paid to the clerk, but if the clerk does receive an appeal without exacting the costs, the appeal is good, and the clerk becomes estopped from saying that the costs have not been paid to the clerk — estopped as to all persons, at least, except the appellant. Hilderbrand v. Housing Auth., 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Failure of condemnor to pay costs and fees within ten days after judgment does not vitiate its appeal therefrom regardless of whether or not it is a political subdivision of the state. Hilderbrand v. Housing Auth., 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Waiver of right to have costs paid in advance. — When a magistrate refuses to dismiss an appeal because costs have not been paid by the appellant, this amounts to a waiver of the right to have the costs paid in advance, and the appellee has no right to complain of the refusal to dismiss the appeal. Hilderbrand v. Housing Auth., 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Party's failure to sign appeal is amendable defect and it is error for the court to strike the amendment tendered at the trial on appeal prior to the introduction of evidence and to dismiss the appeal. State Hwy. Dep't v. Hester, 112 Ga. App. 51, 143 S.E.2d 658 (1965).

Tender of award to condemnee not

condition precedent to condemnor's appeal. — Tender of the amount of the award of the assessors to the apparent or ostensible owner of the land involved is not a condition precedent to the condemnor's right to enter an appeal to a jury, when the amount of the award has been paid into the registry of the court within the time provided by law for the filing of an appeal. State Hwy. Dep't v. Taylor, 216 Ga. 90, 115 S.E.2d 188 (1960).

Receipt of money does not preclude condemnee from attacking appeal. — When the amount of the assessors' award is paid into the registry of the court, and thereafter paid to the condemnee, the condemnee is not precluded, by receiving the money, from attacking the validity of the appeal or moving for its dismissal. State Hwy. Dep't v. Taylor, 216 Ga. 90, 115 S.E.2d 188 (1960).

Cited in United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); Wilson v. State Hwy. Dep't, 85 Ga. App. 907, 70 S.E.2d 535 (1952); Murray v. State Hwy. Dep't, 103 Ga. App. 517, 120 S.E.2d 48 (1961); Alexander v. Rozetta, 110 Ga. App. 660, 139 S.E.2d 451 (1964); Adams v. Housing Auth., 117 Ga. App. 646, 161 S.E.2d 444 (1968); Hinton v. Georgia Power Co., 126 Ga. App. 416, 190 S.E.2d 811 (1972); Georgia Dep't of Transp. v. Woodward, 254 Ga. 587, 331 S.E.2d 557 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 573 et seq.

ALR. — Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 A.L.R.2d 346.

22-2-137. Factors to be considered in determining or estimating just and adequate compensation; determination of date of taking; inclusion of date of approval of original location of highway in petition for condemnation; newspaper advertisement.

(a) In determining or estimating just and adequate compensation to be paid to the owner of any property or interest condemned for public road and street purposes, neither the board of assessors nor the jury, in the event of an appeal to a jury, shall be restricted to the agricultural or productive qualities of the land; but inquiry shall be made as to all other legitimate purposes to which the land could be appropriated. The date of taking as contemplated in this Code section shall be the date of the filing of the condemnation proceedings for the acquisition of the property or interest.

(b) The condemning authority shall cause the petition for condemnation to set forth the date of the approval of the original location of the highway. It shall be the further duty of the condemning authority, within 30 days from the date of the original approval and designation of said location as a highway, to cause the location of said highway in said county to be advertised once each week for four consecutive weeks in the newspaper of the county in which the sheriff's advertisements are

carried; and said advertisement shall designate the land lots or land districts of said county through which such highway will be located. Said advertisement shall further show the date of the said original location of such highway as hereinbefore provided for in this subsection. Said advertisement shall further state that a plat or map of the project showing the exact date of original location is on file at the office of the Department of Transportation and that any interested party may obtain a copy of same by writing to the Department of Transportation (One Georgia Center, 600 West Peachtree NW, Atlanta, Georgia 30308) and paying a nominal cost therefor.

(c) In determining just and adequate compensation for property or interests taken or condemned for public road and street purposes, the award of the board of assessors or the verdict of the jury, in the event of an appeal, shall, in addition to fixing the value of the land actually taken and used for such purposes, take into consideration the prospective and consequential damages to the remaining property or interest from which the property or interest actually taken was cut off, which consequential damages result to such remaining property or interest because of the location of such public road or street upon the portion actually taken. In addition, the increase of the value of such remaining property or interest from the location of such public road or street shall be considered. Such consequential benefits, if any, may be offset against such consequential damages, if any; but in no event shall consequential benefits be offset against the value of the property or interest actually taken for such public improvement.

History. — Code 1933, § 36-1117, enacted by Ga. L. 1966, p. 320, § 1; Ga. L. 2011, p. 752, § 22/HB 142.

Law reviews. — For comment on State Hwy. Dep't v. Lumpkin, 222 Ga. 727, 152 S.E.2d 557 (1966), see 3 Ga. St. B.J. 483 (1967).

JUDICIAL DECISIONS

What is just and adequate compensation is justiciable question, and only the judiciary can lawfully determine that question. Calhoun v. State Hwy. Dep't, 223 Ga. 65, 153 S.E.2d 418 (1967).

There are only two elements of damages to be considered in condemnation proceeding: first, the market value of the property actually taken; second, the consequential damage that will naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting of it to the purposes for which it is condemned. Simon v. Department of Transp., 245 Ga. 478, 265 S.E.2d 777 (1980).

Measure of damages is pecuniary loss sustained by owner. — The measure of damages for property taken by the right of eminent domain, being compensatory in its nature, is the pecuniary loss sustained by the owner, taking into consideration all relevant factors. Ordinarily this loss is represented by the fair market value of the property interest taken, but it may be the fair and reasonable value of the property taken if in fact the market value would not coincide with the actual value thereof. Polk v. Fulton County, 96 Ga. App. 733, 101 S.E.2d 736 (1957).

Anything that actually enhances value of land must be considered in order to meet the constitutional demand

that the owner be paid before the taking, adequate and just compensation. DOT v. Arnold, 154 Ga. App. 502, 268 S.E.2d 775 (1980).

There are three recognized techniques for determining market value: replacement cost new less depreciation, income, and comparable sales. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Measure of consequential damages, if any, to the property which the condemnee retains, is the market value of the remainder in its circumstances just prior to the time of the taking, as compared with its market value in its new circumstances just after the time of the taking. Simon v. Department of Transp., 245 Ga. 478, 265 S.E.2d 777 (1980).

Land and its natural components are one subject matter and what is required is evidence of the fair market value of that one subject matter. DOT v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Improvements on land are proper subjects for independent valuation in consideration of the just and adequate compensation for the total property taken. DOT v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Existing zoning regulations can be pertinent in a condemnation proceeding. DOT v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Attorneys' fees need not be included in the measure of just compensation under the Georgia Constitution. Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980), cert. denied, 450 U.S. 936, 101 S. Ct. 1403, 67 L. Ed. 2d 372 (1981).

Lost profits may be used as means of awarding just and adequate compensation because the income approach necessarily takes into account what future earnings would be were the property interest not extinguished. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Property is "unique" when fair market value will not afford just compensation. — Since valuing property at its fair market value presupposes a willing buyer and a willing seller, properties are "unique" such that fair market value will not afford just and adequate compensation when they are not of type generally bought or sold in the open market. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Private riverfront property is not unique. — Neither "privacy," which is inherent in ownership of all property, nor the fact that the condemned land was "riverfront" property, would authorize a charge on the condemned property having a value "peculiar" to the owner, or that the realty was "unique." Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 355, 299 S.E.2d 592 (1983).

Whether or not property is unique is a jury question. DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

"Unique" property is measured by variety of nonfair market methods of valuation, including the cost and income methods. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Recovery of business losses. — Business losses are recoverable as a separate item only if the property is "unique." DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

When a business belongs to the landowner, total destruction of the business at the location must be proven before business losses may be recovered as a separate element of compensation. DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

When the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land whether the destruction of one's business is total or merely partial, provided only that the loss is not remote or speculative. DOT v. Dixie Hwy. Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

Jury consideration of actual value of land. — While there may be circumstances in which the market value of the total property and the actual value of the improvements plus the actual value of the land are not the same, in such event the jury may still consider the actual value of the land or interest therein appropriated. DOT v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Condemnor's testimony, standing alone, held inadmissible on question of consequential damages. — When a limited access highway is condemned by the state, which highway cuts off several acres from the remainder of the land of the condemnee leaving those several acres without any access thereto, testimony offered by the condemnor that with access there would be no damage to the isolated land, standing alone, is inadmissible and without probative value on the question of consequential damages to those several acres without access. State Hwy. Dep't v. Howard, 124 Ga. App. 76, 183 S.E.2d 26 (1971).

Value finding will not be set aside if within range of evidence. — A value finding in a condemnation case will not be set aside on appeal as inadequate or excessive when it is within the range of the evidence. Freedman v. Housing Auth., 108 Ga. App. 418, 136 S.E.2d 544 (1963).

Expert testimony on impact of temporary easement and value. — In a condemnation action, an expert was properly allowed to testify that a temporary easement had not diminished the fair market value of the land. If evidence could be adduced that the taking of a temporary easement had diminished the fair market value, competent evidence could also be admitted to establish the fact that the temporary taking had not diminished the fair market value. Bulgin v. Ga. DOT, 292 Ga. App. 1, 663 S.E.2d 730 (2008).

Changes in zoning regulations can be pertinent to value. — When an owner's property would probably be rezoned, the trial court did not abuse the court's discretion in admitting the evidence thereof; however, testimony of the "highest and best use" of the property, by itself, was inadmissible when it involved a use precluded by the applicable zoning regulations in effect as of the date of taking. Unified Gov't v. Watson, 276 Ga. 276, 577 S.E.2d 769 (2003).

Cited in City of Douglas v. Rigdon, 116 Ga. App. 306, 157 S.E.2d 66 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 112 et seq., 233 et seq.

Am. Jur. Proof of Facts. — Market Value of Single-Family Residence — Market Comparison Appraisal, 5 POF2d 411.

Highest and Best Use of Property Taken Under Eminent Domain, 19 POF3d 613.

Probable Zoning Change as Bearing on Proof of Market Value in Eminent Domain Proceeding, 40 POF3d 395.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 90 et seq.

C.J.S. — 25 C.J.S., Damages, § 1 et seq.

ALR. — Measure of damages or compensation where property is taken to widen street, 64 A.L.R. 1513.

Right of property owner to compensation for diversion of traffic by relocation or rerouting of highway, 118 A.L.R. 921.

Deduction of benefits in determining compensation or damages in eminent domain, 145 A.L.R. 7.

What physical construction amounts to a change of grade within statute relating to award of damages, 156 A.L.R. 416.

Measure of compensation in eminent domain to be paid to state or municipality for taking of public highway or street, 160 A.L.R. 955.

Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property, 6 A.L.R.2d 1197.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Admissibility, in eminent domain proceedings, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Fire risk or hazard as element of damages in condemnation proceedings, 63 A.L.R.2d 313.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 A.L.R.2d 772.

Unity of ownership necessary to allowance of severance damages in eminent domain, 95 A.L.R.2d 887.

Eminent domain: use or improvement of highway as establishing grade necessary to entitle abutting owner to compensation on subsequent change, 2 A.L.R.3d 985.

Eminent domain: restrictive covenant or right to enforcement thereof as compensable property right, 4 A.L.R.3d 1137.

Propriety and effect, in eminent domain proceedings, of argument or evidence as to source of funds to pay for property, 19 A.L.R.3d 694.

Eminent domain: admissibility, on issue of value of condemned real property, of rental value of other real property, 23 A.L.R.3d 724.

Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway, 42 A.L.R.3d 148.

Condemned property's location in relation to proposed site of building complex or similar improvement as factor in fixing compensation, 51 A.L.R.3d 1050.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 A.L.R.3d 1122.

Good will as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 A.L.R.3d 752.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 A.L.R.3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Eminent domain: compensability of loss of view from owner's property—state cases, 25 A.L.R.4th 671.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

Elements and measure of compensation in eminent domain proceeding for temporary taking of property, 49 A.L.R.6th 205.

22-2-138. Scope of award or verdict; molding of award or verdict; power of court to adjudge condemnation of title upon deposit of amount of award or verdict into court; disposition of award by court.

The award or verdict, as the case may be, shall have respect either to the entire and unencumbered fee or to any separate claim against or interest in the property, as the court may order. The award or verdict may be molded under the direction of the court so as to do complete justice and avoid confusion of interests. It shall be within the power of the court, upon payment of the award or verdict into the registry of the court, to adjudge a condemnation of the title to the property or interest therein and give such direction as to the disposition of the fund as shall be proper, according to the rights of the several respondents, and to cause such pleadings to be filed and such issues to be made as shall be appropriate for an ascertainment and determination of such rights.

History. — Ga. L. 1914, p. 92, § 5; Code 1933, § 36-1111.

JUDICIAL DECISIONS

Purpose of this section is to require payment into the registry of the court so that a proper distribution can be made to all claimants of the fund. City of Gainesville v. Loggins, 224 Ga. 114, 160 S.E.2d 374 (1968).

Trial judge is empowered to disburse condemnation proceeds to those justly entitled thereto, after hearing their respective claims. Hart v. City of Hamilton, 173 Ga. App. 135, 325 S.E.2d 791 (1984).

Tender of award to owner not condition precedent to condemnor's appeal. — Tender of the amount of the award of the assessors to the apparent or ostensible owner of the land involved is not a condition precedent to the condemnor's right to enter an appeal to a jury, when the amount of the award has been paid into the registry of the court within the time provided by law for the filing of an appeal. State Hwy. Dep't v. Taylor, 216 Ga. 90, 115 S.E.2d 188 (1960).

When real estate has been damaged by abutting street improvement made by city, the owner cannot recover any damage for an alleged decrease in the market value of the property when, by reason of the enhanced value of the property by virtue of the improvement, the market value of the property has not been decreased. Stansell & Rape Bros. v. City of McDonough, 50 Ga. App. 234, 177 S.E. 749 (1934).

Evidence of benefit to business from paving of street held admissible. — Competent evidence as to any improvement in or benefit to the business of certain property owners, conducted upon their city property, contiguous to and fronting on a street resulting from the paving of the street by the city, would be admissible in a suit brought by the property owners against the city for damage to their property, as tending to show that petitioners' property has been enhanced in value by reason of such public improvement, in order to set off the damages claimed by the petitioners. Stansell & Rape Bros. v. City of McDonough, 50 Ga. App. 234, 177 S.E. 749 (1934).

The fact that other property, similarly situated, abutting upon the street paved, was also enhanced in value and received benefits from this improvement, is admissible to show in a general way that plaintiffs' property was also enhanced in value and received benefits from such paving. Stansell & Rape Bros. v. City of McDonough, 50 Ga. App. 234, 177 S.E. 749 (1934).

Cited in State Hwy. Dep't v. H.G. Hastings Co., 187 Ga. 204, 199 S.E. 793 (1938); United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); State Hwy. Dep't v. Peavy, 204 Ga. 99, 48 S.E.2d 726 (1948); Wilson v. State Hwy. Dep't, 85 Ga. App. 907, 70 S.E.2d 535 (1952); Golfland, Inc. v. Thomas, 107 Ga. App. 563, 130 S.E.2d 757 (1963); Alexander v. Rozetta, 110 Ga. App. 660, 139 S.E.2d 451 (1964); Fourth Nat'l Bank v. Grant, 140 Ga. App. 78, 230 S.E.2d 60 (1976); DOT v. Garrett, 154 Ga. App. 104, 267 S.E.2d 643 (1980); McDaniel v. DOT, 200 Ga. App. 674, 409 S.E.2d 552 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 548 et seq., 563 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 90 et seq.

ALR. — Quotient condemnation report or award by commissioners or the like, 39 A.L.R.2d 1208.

22-2-139. Right of interested persons to intervene; effect of subsequent proceedings on rights of condemnor.

Nothing in this article which refers to any ruling or order, or time for responding thereto, shall be held or construed to exclude any person by

way of default from making known his rights or claims in the property or interest or in the fund arising therefrom. Any person making any such claim may file appropriate pleadings or intervention at any time before verdict or award, and such person shall be fully heard thereon. If any person after judgment of condemnation desires to come in and be heard on any such claim, he shall be allowed to do so. After condemnation is had and the fund paid into the registry of the court, the condemnor shall not be concerned with or affected by any subsequent proceedings unless upon appeal from the verdict or award as provided in Code Section 22-2-136.

History. — Ga. L. 1914, p. 92, § 7; Code 1933, § 36-1113.

JUDICIAL DECISIONS

Court has power to enjoin condemnor from taking possession of and entering upon land until the issues made by the petition and defensive pleadings have been determined. Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961).

Citizens and taxpayers may seek to prevent illegal disposition of county property. — Citizens and taxpayers of a county have such an interest in county property as will authorize them to seek to prevent an illegal disposition thereof; and, in their efforts to do so, they may enlist the aid of equity to enjoin any such attempted disposition and to cancel deeds to and contracts of sale of county property by which such an illegal disposition of such property is sought to be effectuated. Timbs v. Straub, 216 Ga. 451, 117 S.E.2d 462 (1960).

Separate action will not lie to enjoin condemnation. — Since adequate and complete relief, equitable as well as legal, was afforded any person aggrieved by a condemnation proceeding brought under former Code 1933, § 36-1104 et seq. (see O.C.G.A. § 22-2-130 et seq.) which permitted intervention by such person in the condemnation proceeding itself, a separate action in equity will not lie to enjoin the condemnation proceeding or to contest the constitutionality of the act under which condemnation was proceeding. Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961).

When condemnor pays award of assessors into registry of court, the condemnor is not thereafter concerned with its distribution. Kruetz v. Housing Auth., 107 Ga. App. 315, 130 S.E.2d 134 (1963).

Service of notice upon executor who is also owner. — Although the plaintiff, in the plaintiff's capacity as executor, should have been served with notice of condemnation proceeding, the fact that the plaintiff was served as one of eight "owners" of the land with notice gave the plaintiff knowledge of the proceeding, and the plaintiff could have intervened as executor to protect the interests of the estate under the provision of this section, that anyone claiming any interests or rights in the subject property might intervene in the condemnation proceeding, the plaintiff was in no way harmed by reason of the condemnor's failure to give the plaintiff official notice in the plaintiff's capacity as executor. Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961).

Fears of nuisance held too speculative to permit injunction. — Fears of abutting landowners that land condemned for use as a football stadium would become a nuisance were too speculative to permit the enjoining of the condemnation. Herren v. Board of Educ., 219 Ga. 431, 134 S.E.2d 6 (1963).

City did make its interest known to the court when the city filed a motion for a rehearing on the award contending the city did not receive the requisite notice of the motion to disburse the condemnation award since the newly discovered deeds

showed the city had an interest in the property, and since the award and the motion prayed for an equitable division of the proceeds. Hart v. City of Hamilton, 173 Ga. App. 135, 325 S.E.2d 791 (1984).

Cited in United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); Wilson v. State Hwy. Dep't, 85 Ga. App. 907, 70 S.E.2d 535 (1952); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960); State Hwy. Dep't v. Taylor, 216 Ga. 90, 115 S.E.2d 188 (1960); Fourth Nat'l Bank v. Grant, 140 Ga. App. 78, 230 S.E.2d 60 (1976); Bankston v. City of Barnesville, 221 Ga. App. 446, 471 S.E.2d 543 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 414.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 241 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 255 et seq.

ALR. — Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

22-2-140. Notification of court by tax collector or tax commissioner of taxes due on property or interest; actions by court to discharge lien.

It shall be the duty of any tax collector or tax commissioner notified as required in Code Section 22-2-134 to make known to the court in writing the taxes due on the property or interest; and the court shall give such direction as will satisfy the tax liability and discharge the lien thereon.

History. — Ga. L. 1914, p. 92, § 8; Code 1933, § 36-1114.

JUDICIAL DECISIONS

Cited in United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960).

RESEARCH REFERENCES

ALR. — Rights in respect of real-estate taxes where property is taken in eminent domain, 45 A.L.R.2d 522.

22-2-141. Filing and recording of award, decree, and description of condemned property or interest or copies thereof; payment of fees to clerk of superior court.

When the condemnation is fully completed, the award, whether made by assessors or by the verdict of a jury, together with the decree of the court based thereon and a full and complete description of the property or interest condemned or duly certified copies of such award, decree,

and description, shall be filed and recorded in the records of deeds in the office of the clerk of the superior court of the county where the land so condemned lies. If the land lies in more than one county, such filing and recording shall be made in each county in which the land lies. The clerk shall be entitled to the same fees for such filing and recording as are allowed by law for the filing and recording of deeds, said fees to be paid by the party in whose favor said condemnation is had.

History. — Ga. L. 1919, p. 231, § 1; Code 1933, § 36-1116.

Cross references. — Duty of clerk of superior court to maintain record of deeds, § 15-6-61.

JUDICIAL DECISIONS

Cited in DOT v. Garrett, 154 Ga. App. 104, 267 S.E.2d 643 (1980).

RESEARCH REFERENCES

ALR. — Liability for costs in trial tribunal in eminent domain proceedings as affected by offer or tender by condemnor, 70 A.L.R.2d 804.

22-2-142. Intent of article regarding effect on other methods of condemnation.

This article is intended to be supplementary to and cumulative of Articles 1 and 2 of this chapter in cases in which the State of Georgia, the United States, or any person having the privilege of exercising the right of eminent domain is concerned. This article is also intended to make simpler and more effective the method of condemnation in those cases where conflicting interests or doubtful questions render a judicial supervision of the procedure desirable. In all particulars not otherwise specially provided for in this article, the court shall conform its procedure as nearly as possible to Articles 1 and 2 of this chapter, and the same shall remain in force.

History. — Ga. L. 1914, p. 92, § 9; Code 1933, § 36-1115; Ga. L. 1937-38, Ex. Sess., p. 251, § 1.

JUDICIAL DECISIONS

Cited in State Hwy. Dep't v. H.G. Hastings Co., 187 Ga. 204, 199 S.E. 793 (1938); United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); Wilson v. State Hwy. Dep't, 85 Ga. App. 907, 70 S.E.2d 535 (1952); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960); DeKalb County v. Jackson-Atlantic Co., 123 Ga. App. 695, 182 S.E.2d 160 (1971).

RESEARCH REFERENCES

ALR. — Condemnation by de facto corporation, 44 A.L.R. 542.

CHAPTER 3

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22-3-160. "Utility" defined.
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22-3-162. Application; additional compensation or reconveyance.

Cross references. — Right of State Transportation Board to exercise right of eminent domain to acquire sites for airports, landing fields, and air navigation facilities, § 6-3-1. Power of municipal and county housing authorities to exercise power of eminent domain generally, § 8-3-31. Exercise of power of eminent domain for public school purposes, § 20-2-521. Authority of board of regents to exercise power of eminent domain, § 20-3-58. Authority of Department of Transportation to exercise power of eminent domain, § 32-2-2(a)(8). Exercise of power of eminent domain for public road purposes, § 32-3-1 et seq.

ARTICLE 1

CONSTRUCTION, MAINTENANCE, AND OPERATION OF TELEGRAPH AND TELEPHONE LINES ALONG RAILROAD RIGHTS OF WAY

Cross references. — Similar provisions regarding exercise of power of eminent domain for purposes of constructing and operating telephone and telegraph lines along public highways or railroad rights of way, § 46-5-1.

JUDICIAL DECISIONS

This procedure affords due process of law to the railroad companies whose property is sought to be condemned. Savannah, Fla. & W. Ry. v. Postal Telegraph-Cable Co., 115 Ga. 554, 42 S.E. 1 (1902); Western & Atl. R.R. v. Western Union Tel. Co., 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

The necessity for taking private property for public use is a question for legislative determination, and the provisions relating to such taking are not, because they fail to provide for a special tribunal to pass upon such necessity, violative of the constitutional prohibition against taking the property without due process of law. Savannah, Fla. & W. Ry. v. Postal Telegraph-Cable Co., 115 Ga. 554, 42 S.E. 1 (1902).

Failure to provide for appeal does not render statute unconstitutional. — Although a statute authorizing exercise of eminent domain may not provide for appeal from the award of the assessors, it is not, for this reason, unconstitutional. Savannah, Fla. & W. Ry. v. Postal Telegraph-Cable Co., 112 Ga. 941, 38 S.E. 353 (1901).

Party with right to condemn has large discretion in selection of particular property to be condemned; therefore, in the absence of bad faith, the determination by the condemnor of reasonable necessity for acquiring the condemnee's land cannot be disturbed by a court on appeal. Harwell v. Georgia Power Co., 154 Ga. App. 142, 267 S.E.2d 769, aff'd, 246 Ga. 203, 269 S.E.2d 464 (1980).

Telegraph company does not acquire fee, but only easement in right of way of a railway company condemned for the purpose of constructing a telegraph line; the easement embraces land actually occupied by poles and fixtures for guy wires, the right to stretch wires on poles, and to enter upon right of way to construct and repair telegraph line. Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Proposed telegraph line must produce no material interference with railroad operation. — A telegraph company may condemn a right of way on and along the right of way of a railroad company, when the proposed line of telegraph will be so constructed as to produce no material interference with the railroad company's free exercise of its franchise or with the actual operation of the railroad. Western & Atl. R.R. v. Western Union Tel. Co., 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

Law does not contemplate that telegraph company can arbitrarily condemn both sides of railroad track for the construction of lines on both sides of the track, when the necessary wires could be strung upon poles on one side of the track. Western & Atl. R.R. v. Western Union Tel. Co., 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

Elements to be considered in determination of damages. — See Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904); Western & Atl. R.R. v. Western Union Tel. Co., 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

Measure of damages in condemnation case is value of land actually taken, and the extent to which the value and use of the right of way by the railway company is diminished by its use by the telegraph company. Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Value of right of way for other uses cannot be considered. — In arriving at the value of the land actually appropriated, the general salable value of the right of way for other uses than that to which it is applied by the railway company cannot be considered; the appropriation to public use amounts to a withdrawal of the right of way from any use except that which is necessary or ancillary to the operation of the railroad. Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Peculiar advantages of right of way not proper element of damages. — That the right of way may possess peculiar advantages and benefits to the tele-

graph company in the construction and maintenance of its line is not a proper element in the estimate of damages. Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Appeal from assessors' award under former Civil Code 1895, § 4678 (see O.C.G.A. § 22-2-80) was permitted in a proceeding under Ga. L. 1898, p. 54, § 1 et seq. (see O.C.G.A. § 22-3-1 et seq.). Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Amount of compensation is issue of fact for jury on appeal. — On appeal from the award of the assessors in a condemnation proceeding, the issue of fact for the jury is the amount of compensation to be paid for the property taken or damaged for public purposes. Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Telegraph company may begin construction pending appeal after depositing award. — A telegraph company which has proceeded to condemn a sufficiency of the right of way of railway company for purpose of erecting a telegraph line may, pending an appeal from the award of the assessors, lawfully proceed to construct its line on the right of way after it has deposited the amount of the award in the office of the clerk of the superior court of the county where such proceedings were had. Savannah, Fla. & W. Ry. v. Postal Telegraph-Cable Co., 115 Ga. 554, 42 S.E. 1 (1902).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 144 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 27 et seq.

ALR. — Right to and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway, 19 A.L.R. 383.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 A.L.R. 679.

Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 A.L.R.2d 724.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 A.L.R.4th 68.

22-3-1. Direction and contents of notice of condemnation.

When a telegraph or telephone company undertakes to condemn so much of the right of way of a railroad company as may be necessary for the purpose of constructing, maintaining, and operating its telegraph or telephone lines along and upon such right of way, the notice of condemnation provided for in Code Section 22-2-26 shall be directed to the railroad company and shall:

(1) Set out the manner in which the telegraph or telephone company proposes to construct its lines on the right of way of the railroad company;

(2) Fix the time when the hearing shall be had;

(3) Give the name of the assessor selected by the telegraph or telephone company; and

(4) Request the railroad company to select an assessor.

History. — Ga. L. 1898, p. 54, § 1; Civil Code 1910, § 5236; Code 1933, § 36-701.

JUDICIAL DECISIONS

Notice held sufficient. — See Savannah, Fla. & W. Ry. v. Postal Telegraph-Cable Co., 115 Ga. 554, 42 S.E. 1 (1902).

Cited in Pye v. State Hwy. Dep't, 226 Ga. 389, 175 S.E.2d 510 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 433 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 306 et seq.

ALR. — Right of carrier to discriminate between telegraph or telephone companies, 60 A.L.R. 1081.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemnor's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Right to condemn property in excess of needs for a particular public purpose, 6 A.L.R.3d 297.

Eminent domain: validity of appropriation of property for anticipated future use, 80 A.L.R.3d 1071.

Applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's having power of eminent domain, 87 A.L.R.3d 1265.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

22-3-2. Manner of service of notice.

Notice of condemnation shall be served upon the railroad company in the manner provided for the service of other actions upon railroad companies. It shall not be necessary to serve such notice upon any person or corporation other than the railroad company in possession of and operating the railroad whose right of way is sought to be condemned by the telegraph or telephone company for its use; and only the interest of such railroad company so served shall be affected by the proceedings.

History. — Ga. L. 1898, p. 54, § 1; Civil Code 1910, § 5237; Code 1933, § 36-702.

JUDICIAL DECISIONS

This procedure affords due process of law to the railroad companies whose property is sought to be condemned. Savannah, Fla. & W. Ry. v. Postal Telegraph-Cable Co., 115 Ga. 554, 42 S.E. 1 (1902); Western & Atl. R.R. v. Western Union Tel. Co., 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

Contract alternative. — Cable company that possessed certificate of authorization from Georgia Public Service Commission that allowed it to exercise

eminent domain under O.C.G.A. § 46-5-1(a) properly entered into contract with railroad, in lieu of eminent domain proceedings, to allow construction of communication lines along railroad's rights of way. Davis v. Williams Communs., Inc., 258 F. Supp. 2d 1348 (N.D. Ga. 2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 433 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 306 et seq.

ALR. — Eminent domain: permissible modes of service of notice of proceedings, 89 A.L.R.2d 1404.

22-3-3. Necessity for only one proceeding; location of proceedings; form of assessors' findings.

There need be but one condemnation proceeding against the same railroad company, which proceeding may be conducted in any county where service can be made upon the company as provided in Code Section 22-3-2. However, if the railroad company has a main or principal office located in this state, the proceeding shall be conducted in the county in which the main or principal office is located. The assessors shall make their findings of the damages to which the railroad company may be entitled by reason of the construction, maintenance, and operation of the telegraph or telephone lines in the manner set out in the notice.

History. — Ga. L. 1898, p. 54, § 1; Civil Code 1910, § 5238; Code 1933, § 36-703.

RESEARCH REFERENCES

ALR. — Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

22-3-4. Location of hearing before assessors; evidence upon which findings may be based.

The hearing may be conducted in the office of the judge of the probate court of the county in which the condemnation proceedings are had or at such other place as the assessors may fix. In assessing the damages to the railroad company, the assessors need not go upon or inspect the premises sought to be condemned, but they shall make their findings upon the testimony heard by them.

History. — Ga. L. 1898, p. 54, § 1; Civil Code 1910, § 5239; Code 1933, § 36-704.

JUDICIAL DECISIONS

Elements to be considered in determination of damages. — See Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904); Western & Atl. R.R. v. Western Union Tel. Co., 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

Measure of damages in condemnation case is value of land actually taken, and the extent to which the value and use of the right of way by the railway company is diminished by its use by the telegraph company. Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Value of right of way for other uses cannot be considered. — In arriving at the value of the land actually appropriated, the general salable value of the right of way for other uses than that to which it is applied by the railway company cannot be considered; the appropriation to public use amounts to a withdrawal of the right of way from any use except that which is necessary or ancillary to the operation of the railroad. Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Peculiar advantages of right of way not proper element of damages. — That the right of way may possess peculiar advantages and benefits to the telegraph company in the construction and maintenance of its line is not a proper element in the estimate of damages. Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Appeal from assessors' award under former Civil Code 1895, § 4678 (see O.C.G.A.§ 22-2-80) was permitted in a proceeding under Ga. L. 1898, p. 54, § 1 et seq. (see O.C.G.A. § 22-3-1 et seq.). Atlantic Coast Line R.R. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 516 et seq., 520 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 335 et seq.

ALR. — Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 A.L.R. 194.

Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

Right to view by jury in condemnation proceedings, 77 A.L.R.2d 548.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 A.L.R.2d 346.

ARTICLE 2

CONSTRUCTION AND OPERATION OF ELECTRIC POWER PLANTS

JUDICIAL DECISIONS

Proceeding before special master available to private company. — A private company possessing the power of eminent domain is authorized to employ the condemnation procedure. Nodvin v. Georgia Power Co., 125 Ga. App. 821, 189 S.E.2d 118 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 144 et seq., 290 et seq., 306 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 27 et seq.

ALR. — Right to and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway, 19 A.L.R. 383.

Elements and measure of compensation for power lines or other wire lines over private property, 49 A.L.R. 697; 124 A.L.R. 407.

Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 A.L.R. 676.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 A.L.R. 679.

Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 A.L.R.2d 724.

Correlative rights of dominant and servient owners in right of way for electric line, 6 A.L.R.2d 205.

Liability of water distributor for damage caused by water escaping from main, 20 A.L.R.3d 1294.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 A.L.R.3d 1293.

Eminent domain: review of electric power company's location of transmission line for which condemnation is sought, 19 A.L.R.4th 1026.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific cover, 26 A.L.R.4th 68.

Part 1

General Provisions

22-3-20. Power of persons operating or constructing electric plants to purchase, lease, or condemn rights of way and easements.

Any person operating or constructing or preparing to construct a plant for generating electricity shall have the right to purchase, lease, or condemn rights of way or other easements over the lands of others in order to run power lines, maintain dams, flow backwater, or carry on other activities necessary for constructing and operating such a plant, provided that the person first pays just compensation to the owner of the land to be affected.

History. — Ga. L. 1897, p. 68, § 1; Civil Code 1910, § 5240; Code 1933, § 36-801.

Cross references. — Granting of easements and rights of way to electric utilities for purposes of producing hydroelectric power from dam sites on property owned by governing authority of recreation system, § 36-64-3.1.

Law reviews. — For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

JUDICIAL DECISIONS

This Code section is constitutional. Jones v. North Ga. Elec. Co., 125 Ga. 618, 54 S.E. 85, 6 L.R.A. (n.s.) 122, 5 Ann. Cas. 526 (1906); Nolan v. Central Ga. Power Co., 134 Ga. 201, 67 S.E. 656 (1910); Banks v. Georgia Power Co., 267 Ga. 602, 481 S.E.2d 200 (1997).

Section grants power of eminent domain to corporate utilities. — The power of eminent domain is inherent in the sovereign state, but lies dormant until granted by act of the legislature; under the provisions of this section, corporate utilities supplying electric power to the public have been granted the power of eminent domain. Harwell v. Georgia Power Co., 154 Ga. App. 142, 267 S.E.2d 769, aff'd, 246 Ga. 203, 269 S.E.2d 464 (1980).

This section limits interest in land which power company can condemn for electric distribution purposes. B. & W. Hen Farm, Inc. v. Georgia Power Co., 222 Ga. 830, 152 S.E.2d 841 (1966).

This section confers no power to condemn undivided interest or easement in water-power the remainder of which is owned by the electric-light corporation which is seeking to condemn. Oconee Elec. Light & Power Co. v. Carter, 111 Ga. 106, 36 S.E. 457 (1900); Nolan v. Central Ga. Power Co., 134 Ga. 201, 67 S.E. 656 (1910).

Civil Code 1910, § 5240 (see O.C.G.A. § 22-3-20) did not conflict with former Civil Code 1910, § 3633 (see O.C.G.A. § 44-8-3), defining the rights of a riparian owner of a nonnavigable stream. Nolan v. Central Ga. Power Co., 134 Ga. 201, 67 S.E. 656 (1910).

Determination of "public use". — Whether a purpose is a public or private purpose within the meaning of the law relating to eminent domain does not depend on use or the amount of use by the public, but upon the right of the public to such use. Rogers v. Toccoa Elec. Power Co., 163 Ga. 919, 137 S.E. 272 (1927).

Foreign corporation domesticated in Georgia has right to condemn land. — A corporation chartered in another state with the right to own and operate an electric plant and engage in the business of generating, transmitting, and selling electricity for commercial and domestic use, and later domesticated in this state by appropriate proceedings, has the right to condemn the land of others for the purpose of running its lines or wires over the land and using and maintaining poles and appliances thereon in order to distribute electric current to the public from its plant. Perry v. Folkston Power Co., 181 Ga. 527, 183 S.E. 58 (1935).

A foreign corporation owning or controlling water power in this state, when domesticated under the laws of Georgia, can exercise the right of eminent domain in this state for the purposes mentioned in this section. A foreign corporation without being so domesticated has no such right. Head v. Rich, 61 Ga. App. 293, 6 S.E.2d 73 (1939), aff'd, 190 Ga. 680, 10 S.E.2d 183 (1940) (decided under former Code 1933 § 22-1601).

De facto corporation cannot exercise eminent domain. — A power company that has become a de facto corporation cannot exercise the powers conferred by this section. Rogers v. Toccoa Power Co., 161 Ga. 524, 131 S.E. 517, 44 A.L.R. 534 (1926).

Effect of county ordinance impeding rights under section. — Pursuant to O.C.G.A. § 46-3-201(b)(9), the electric corporation, which had to condemn property in order to effectuate its project, did not have to demonstrate to the county the necessity or the appropriateness of its proposed project; thus, the county ordinance prohibiting the electric lines for three years was unconstitutional. Rabun County v. Ga. Transmission Corp., 276 Ga. 81, 575 S.E.2d 474 (2003).

Forsyth County, Ga., Unified Development Code §§ 21-6.1 and 21-6.5, were defective because they required a utility to successfully comply with the ordinance's procedures, and authorized the county to deny "any or all" portions of an application; as such, they were unconstitutional infringements on the utility's legislatively-delegated power of eminent domain. Forsyth County v. Ga. Transmission Corp., 280 Ga. 664, 632 S.E.2d 101 (2006).

Eminent domain power not lost through furnishing power in another state. — A corporation having the power of eminent domain would not lose such power because it also furnished electric power in Tennessee. Rogers v. Toccoa Elec. Power Co., 163 Ga. 919, 137 S.E. 272 (1927).

This section does not authorize power company to maintain nuisance. Towaliga Falls Power Co. v. Sims, 6 Ga. App. 749, 65 S.E. 844 (1909); Central Ga. Power Co. v. Ham, 139 Ga. 569, 77 S.E. 396 (1913).

Notice to owner required. — Preliminary to the exercise of the power granted by this section, for the purpose of erecting an electric line with necessary poles and fixtures, it is incumbent upon the power company to serve a notice on the owner of the property sought to be condemned, which notice shall describe the property with the same definiteness as is required in a deed of conveyance of land. Gunn v. Georgia Power Co., 205 Ga. 85, 52 S.E.2d 449 (1949).

In proceeding under this section sole question for assessors is amount of compensation to be paid; the assessors cannot pass upon the legal power of the company to institute such proceedings. Rogers v. Toccoa Power Co., 161 Ga. 524, 131 S.E. 517, 44 A.L.R. 534 (1926).

Injunction is proper remedy to determine power of eminent domain. The remedy of the landowner who seeks to challenge the legal power of a company to condemn is to apply to a court of equity to enjoin the condemnation proceedings if they are unauthorized. Rogers v. Toccoa Power Co., 161 Ga. 524, 131 S.E. 517, 44 A.L.R. 534 (1926).

Injunction is proper remedy for questioning legality of corporation's charter. Rogers v. Toccoa Power Co., 161 Ga. 524, 131 S.E. 517, 44 A.L.R. 534 (1926).

Owner who permits appropriation of land estopped from ejectment or injunction. — If a landowner stands by and permits, without legal objection, a public utility company to appropriate the landowner's land to its necessary corporate use until such becomes a necessary and constituent part of its service to the public, and the rights of the public intervene to such extent that to oust the company would interrupt the service and deny it to the public, the landowner, not for the protection so much of the company but for the benefit of the public, will be estopped from recovering the land in ejectment from enjoining its use for the service, but will, if he moves in time, be remitted to an appropriate action for damages. Wiggins v. Southern Bell Tel. & Tel. Co., 245 Ga. 526, 266 S.E.2d 148 (1980).

Damage to other property from power lines on right of way. — The power, telephone and telegraph companies all have the power of eminent domain, and could exercise that power to acquire the right to erect their lines upon the railroad's right of way. That they choose to acquire by contract such right, as against the railroad, does not render the railroad company liable for their alleged failure also to compensate the plaintiff for the taking or damaging of the plaintiff's property by their erection of power and communication lines on the railroad's right of way. Tompkins v. Atlantic Coast Line R.R., 89 Ga. App. 171, 79 S.E.2d 41 (1953).

Cited in Pye v. State Hwy. Dep't, 226 Ga. 389, 175 S.E.2d 510 (1970); Harwell v. Georgia Power Co., 246 Ga. 203, 269 S.E.2d 464 (1980); Cox Enters., Inc. v. Carroll City/County Hosp. Auth., 247 Ga. 39, 273 S.E.2d 841 (1981); Banks v. Georgia Power Co., 220 Ga. App. 84, 469 S.E.2d 218 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d*, Eminent Domain, §§ 144 et seq., 290 et seq., 306 et seq.

Am. Jur. Pleading and Practice Forms. — 25 Am. Jur. Pleading and Practice Forms, Waterworks and Water Companies, § 2.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 27 et seq., 117 et seq. 73 C.J.S., Public Utilities, §§ 151 et seq., 277 et seq.

ALR. — Furnishing electricity to public as public use or purpose for which power of eminent domain may be exercised, 44 A.L.R. 735; 58 A.L.R. 787.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Electric light or power line in street or highway as additional servitude, 58 A.L.R.2d 525.

Right to condemn property in excess of needs for a particular public purpose, 6 A.L.R.3d 297.

Eminent domain: right to enter land for preliminary survey or examination, 29 A.L.R.3d 1104.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 A.L.R.3d 1122.

Good will as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

Applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's having power of eminent domain, 87 A.L.R.3d 1265.

Liability for overflow of water confined or diverted for public power purposes, 91 A.L.R.3d 1065.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 A.L.R.3d 752.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 A.L.R.3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23 A.L.R.4th 631.

22-3-21. Payment of compensation or damages.

In fixing the compensation or damage for both actual and consequential damages, either or both shall be paid by the persons seeking to condemn property as provided in this article.

History. — Ga. L. 1925, p. 272, § 1; Code 1933, § 36-802.

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, §§ 66 et seq., 206 et seq.

ALR. — Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property, 6 A.L.R.2d 1197.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Liability of water distributor for damage caused by water escaping from main, 20 A.L.R.3d 1294.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of

others for the same undertaking, 59 A.L.R.3d 488.

Eminent domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 A.L.R.3d 534.

Good will as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

Liability for overflow of water confined or diverted for public power purposes, 91 A.L.R.3d 1065.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 A.L.R.3d 752.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 A.L.R.3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

22-3-22. Condemnation of mills, factories, and dams.

Any person seeking to exercise the power of eminent domain under Code Section 22-3-20 shall have the right and authority to acquire by condemnation any mill, factory, dam, or other property or interest connected with same, except cotton mills or factories or any plant engaged in furnishing electric power to the public.

History. — Civil Code 1910, § 5242; Ga. L. 1925, p. 272, § 3; Code 1933, § 36-812.

JUDICIAL DECISIONS

Protection accorded to mills and factories extends to appurtenances necessary to their operation, but not to property from which the crude material is taken for supplying such mill or factory. Beuchler v. Georgia Ry. & Power Co., 139 Ga. 724, 78 S.E. 121 (1913); Nolan v. Central Ga. Power Co., 134 Ga. 201, 67 S.E. 656 (1910).

Protection applies to mills and factories operated by steam power as well as to those operated by water power. Stribbling v. Georgia Ry. & Power Co., 139 Ga. 676, 78 S.E. 42 (1913).

Cited in Lewis v. Fidelity & Deposit Co., 292 U.S. 559, 54 S. Ct. 848, 78 L. Ed. 1425 (1934).

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 51 et seq.

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

PART 2

ACQUISITION OF RIGHT TO FLOOD ROADS AND HIGHWAYS

22-3-40. "Public road" and "public highway" defined.

As used in this part, the term "public road" or "public highway" means not only roads and highways proper but bridges, culverts, and appurtenances as well.

History. — Ga. L. 1927, p. 370, § 4; Code 1933, § 36-803.

22-3-41. Power to acquire right to flood roads and highways.

Any person referred to in Code Section 22-3-20 shall have the right and authority to acquire by purchase or condemnation the right to flood private roads or highways. Any such person shall also have the right to acquire by condemnation the right to flood public roads or highways by paying to the state or county authorities having jurisdiction over the same the cost of locating, laying out, constructing, and opening other public roads or highways to replace the public roads or highways flooded or intended to be flooded and also by paying to the state and county authorities any other damages that may be the natural and probable consequence of such flooding.

History. — Ga. L. 1925, p. 272, § 1; Code 1933, § 36-804.

Cross references. — Abandonment of public roads, T. 32, C. 7.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 297 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 100 et seq.

ALR. — Applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's having power of eminent domain, 87 A.L.R.3d 1265.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

22-3-42. Notice of intention to condemn.

If a public road or highway for which condemnation is sought is a part of the state highway system or if jurisdiction or control of the road or highway has been taken over or assumed by the State Transportation Board or other state authority, the notice of intention to condemn shall be addressed to and served upon the commissioner of transportation. If the road or highway is under the supervision or control of county authorities, the notice of intention to condemn shall be addressed to and served upon the judge of the probate court or upon any county

commissioner or such other officer as is by law vested with jurisdiction over and control of the public roads of the county in which the road to be condemned is located.

History. — Ga. L. 1927, p. 370, § 4; Code 1933, § 36-808.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 433 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 57 et seq., 306 et seq.

22-3-43. Condemnation procedure; authorization of officers to act for state or county.

The procedure in the condemnation of public roads and highways shall be the same as provided by Chapter 2 of this title insofar as the procedures described in that chapter are not in conflict with this part. The public officer or officers to be notified and served as provided in Code Section 22-3-42 shall act for and in behalf of the state or county, as the case may be, in the appointment of an assessor and in all other respects as provided in Chapter 2 of this title with respect to the owner of the property or interest sought to be condemned.

History. — Ga. L. 1927, p. 370, § 4; Code 1933, § 36-809.

RESEARCH REFERENCES

ALR. — Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

22-3-44. Appeal to superior court.

Within 30 days after the award of condemnation is made pursuant to Part 4 of Article 1 of Chapter 2 of this title or pursuant to Article 2 of Chapter 2 of this title, any party may appeal to the superior court of the county in which the public roads or highways lie by filing with the judge of the probate court of the county a written notice of appeal. Within ten days after his receipt of the notice, the judge shall transmit the notice to the superior court. The trial on such an appeal shall be de novo.

History. — Ga. L. 1925, p. 272, § 1; Code 1933, § 36-805.

JUDICIAL DECISIONS

Cited in Hinton v. Georgia Power Co., 126 Ga. App. 416, 190 S.E.2d 811 (1972); Brown v. Techdata Corp., 238 Ga. 622, 234 S.E.2d 787 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appellate Review, § 75 et seq. 27 Am. Jur. 2d, Eminent Domain, § 573 et seq.

ALR. — Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 A.L.R. 194.

Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 A.L.R.2d 346.

22-3-45. Rights of condemnor pending appeal.

Upon the condemnor's paying the sum fixed by the assessor's award to the state or county authorities together with the cost of proceedings pending an appeal pursuant to Code Section 22-3-44 and upon the execution of a bond in double the amount of the award so fixed, with good and sufficient surety to pay the eventual condemnation award, the condemnor shall be entitled to flood the public roads or highways which are made the subject of the proceedings, provided that such right shall not vest absolutely in the condemnor until the final determination of the case and the payment or deposit in court of the final condemnation award.

History. — Ga. L. 1925, p. 272, § 1; Code 1933, § 36-806.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 573 et seq., 586 et seq.

22-3-46. Restrictions on use of condemned road or highway by condemnor.

Before any public road or highway condemned under this part may be used by the condemnor, any new road or highway to be constructed pursuant to Code Section 22-3-41, including any and all bridges and culverts that may be necessary as a part thereof, shall be laid out, constructed, and made ready for public use by the condemnor. All of this new construction shall first be approved by the authorities having control of the condemned road or highway.

History. — Ga. L. 1927, p. 370, § 4; Code 1933, § 36-810.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 67 et seq, 297 et seq. 27 Am. Jur. 2d, Eminent Domain, § 790.

22-3-47. Effect of part on rights of action of property owners and public utilities.

This part shall not be construed as taking away or in any way prejudicing any right of action possessed by a property owner or a public utility for damages to property caused by the closing of any public road or highway under this part.

History. — Ga. L. 1925, p. 272, § 1; Code 1933, § 36-807.

RESEARCH REFERENCES

ALR. — Liability of water distributor for damage caused by water escaping from main, 20 A.L.R.3d 1294.

Liability for overflow of water confined or diverted for public power purposes, 91 A.L.R.3d 1065.

ARTICLE 3

CONSTRUCTION AND OPERATION OF WATERWORKS AND SANITARY SEWAGE SYSTEMS

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 27 et seq.

ALR. — Right to and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway, 19 A.L.R. 383.

Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 A.L.R. 676.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 A.L.R. 679.

Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 A.L.R.2d 724.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 A.L.R.3d 1293.

22-3-60. Authority to lease, purchase, or condemn property or receive donations for waterworks and sewage systems.

Any nongovernmental entity constructing, owning, or operating any waterworks or sanitary sewerage system, or both, in this state shall have the right, power, privilege, and authority to lease, purchase, or

condemn property or any interest therein, including easements, or to receive donations or grants of property or any interest therein, including easements, for the purpose of constructing and operating a waterworks, a water distribution system, a sewerage collection system, or a sewage treatment and disposal system, or any combination of such systems or facilities; provided, however, that prior to condemning property in any political subdivision, any such entity shall first obtain the consent of the governing authority of such political subdivision after the requirements of Code Section 22-1-10 have been satisfied. Consent shall be granted by resolution or ordinance.

History. — Ga. L. 1889, p. 184, § 1; Civil Code 1895, § 2407; Civil Code 1910, § 2923; Code 1933, § 36-901; Ga. L. 1990, p. 731, § 1; Ga. L. 2000, p. 1514, § 1; Ga. L. 2006, p. 39, § 16/HB 1313.

Cross references. — Authority of municipal corporations to exercise power of eminent domain for purposes of constructing, and extending water systems and sewage systems, § 36-34-5. Acquisition and construction of water and sewage systems, § 36-34-5.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For annual survey article on real property law, see 52 Mercer L. Rev. 383 (2000). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

JUDICIAL DECISIONS

Company holding franchise and having eminent domain power owes public duty. — A company which holds a franchise to conduct the business of furnishing water to a city and its inhabitants and which has the power of eminent domain is a public service corporation, and owes a public duty to the city's inhabitants. Washington Water & Elec. Co. v. Pope Mfg. Co., 176 Ga. 155, 167 S.E. 286 (1932).

Cited in Pye v. State Hwy. Dep't, 226 Ga. 389, 175 S.E.2d 510 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 54 et seq. 78 Am. Jur. 2d, Waterworks and Water Companies, §§ 7 et seq., 14 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 27 et seq., 94 et seq. 73 C.J.S., Public Utilities, §§ 151 et seq., 277 et seq.

ALR. — Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Right to condemn property in excess of needs for a particular public purpose, 6 A.L.R.3d 297.

Eminent domain: right to enter land for preliminary survey or examination, 29 A.L.R.3d 1104.

Applicability of zoning regulations to projects of nongovernmental public utility

as affected by utility's having power of eminent domain, 87 A.L.R.3d 1265.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

22-3-61. Condemnation procedure.

If a person seeking to exercise the power of eminent domain under this article fails to procure, by contract, title to the land necessary or proper for the construction and successful operation of a waterworks or sanitary sewerage system, or both, and the parties cannot agree upon the damage done, the same shall be assessed as provided in Chapter 2 of this title.

History. — Ga. L. 1889, p. 184, § 2; Civil Code 1895, § 2408; Civil Code 1910, § 2924; Code 1933, § 36-902; Ga. L. 1990, p. 731, § 1.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 370 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 250 et seq.

ALR. — Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

22-3-62. Applicability of article.

The powers granted by this article shall apply to those persons who have entered into a contract with the proper authorities for supplying water for public purposes and to such persons providing water or sanitary sewerage services through water or sanitary sewerage systems, or both, which have been permitted by the Environmental Protection Division of the Department of Natural Resources.

History. — Ga. L. 1889, p. 184, § 3; Civil Code 1895, § 2409; Civil Code 1910, § 2925; Code 1933, § 36-903; Ga. L. 1990, p. 731, § 1.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 63, 66. 27 Am. Jur. 2d, Eminent Domain, §§ 306 et seq., 314 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 27 et seq., 35 et seq.

22-3-63. Authority to condemn property for purpose of constructing a waterworks, water distribution system, sewage collection system, or sewage treatment and disposal system.

Any other provision of law to the contrary notwithstanding, any nongovernmental entity which:

(1) Is privately owned and is operated under the collective management and control of the owners;

(2) Was in the business of providing water supply and sewerage collection and disposal prior to July 1, 1978;

(3) Has continuously owned a sanitary sewerage system since July 1, 1978, permitted by the Environmental Protection Division of the Department of Natural Resources; and

(4) On May 1, 2000, owns and operates one or more sewerage collection treatment and disposal systems serving 1,000 or more customers

shall have the authority to condemn property or any interest therein, including easements, for the purpose of constructing and operating a waterworks, a water distribution system, a sewerage collection system, or a sewage treatment and disposal system, or any combination of such systems or facilities; provided, however, that such authority shall obtain the consent of the governing authority of the county or municipality that controls the land sought to be condemned in accordance with Code Section 22-3-60. The authority granted by this Code section shall extend only to such counties and those counties immediately adjacent to such counties in which such entity owned or operated such waterworks or systems or combination as of January 1, 2000; and provided, further, that the authority provided for in this Code section shall terminate with respect to any entity if any interest in such business is transferred to another person or entity except through inheritance.

History. — Code 1981, § 22-3-63, enacted by Ga. L. 2000, p. 1514, § 2; Ga. L. 2006, p. 39, § 16/HB 1313.

Cross references. — Acquisition and construction of water and sewage systems, § 36-34-5.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, "May 1, 2000," was substituted for "the effective date of this Code section" in paragraph (4).

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 94 et seq.

ARTICLE 4

CONSTRUCTION AND OPERATION OF PETROLEUM PIPELINES

Editor's notes. — Ga. L. 1995, p. 161, effective July 1, 1995, repealed the Code sections formerly codified at this article and enacted the former provisions on the construction and operation of petroleum pipelines. The former article consisted of Code Sections 22-3-70 through 22-3-72 (Part 1) and 22-3-80 through 22-3-83 (Part 2) and was based on Ga. L. 1981, Ex. Sess., p. 8 (Code enactment Act) and Ga. L. 1994, p. 229, §§ 1 and 2. Ga. L. 1995, p. 161 also enacted an Article 4, effective from March 30, 1995, until July 1, 1995, which consisted of Code Section 22-3-83.

Ga. L. 2017, p. 744, § 2/HB 413, effective May 9, 2017, for purposes of proposing rules and regulations and effective for all other purposes July 1, 2017, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 22-3-80 through 22-3-91, relating to the construction and operation of petroleum pipelines, and was based on Ga. L. 1995, p. 161, § 2; Ga. L. 1996, p. 6, § 22; Ga. L. 2016, p. 744, § 1/HB 1036 and Ga. L. 2017, p. 774, § 22(2-4)/HB 323.

Ga. L. 2017, p. 774, § 54(e)/HB 323, not codified by the General Assembly, provides: "In the event of a conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2017 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the conflict." Accordingly, the amendment to former Code Section 22-3-89 by Ga. L. 2017, p. 774, § 22(4)/HB 323, was not given effect.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former O.C.G.A. § 22-3-70 et seq. are included in the annotations for this article.

Petroleum pipeline operators were entitled to clear easements. — Operators of petroleum pipelines were entitled to clear easements to permit aerial inspection and access by maintenance crews. Avery v. Colonial Pipeline Co., 213 Ga. App. 388, 444 S.E.2d 363 (1994) (decided under former O.C.G.A. § 22-3-70 et seq.).

RESEARCH REFERENCES

Am. Jur. Trials. — Trial of a Gas Pipeline Leak and Explosion Case, 25 Am. Jur. Trials 415.

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 61, 81, 84, 86.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 27 et seq., 117 et seq. 73 C.J.S., Public Utilities, §§ 151 et seq., 277 et seq.

ALR. — Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Right to condemn property in excess of

needs for a particular public purpose, 6 A.L.R.3d 297.

Eminent domain: right to enter land for preliminary survey or examination, 29 A.L.R.3d 1104.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23 A.L.R.4th 631.

Am. Jur. 2d. — 38 Am. Jur. 2d, Gas and Oil, § 1 et seq.

26 Am. Jur. 2d, Eminent Domain, § 84.

Am. Jur. Pleading and Practice Forms. — 12C Am. Jur. Pleading and Practice Forms, Gas and Oil, § 1 et seq.

22-3-80. Definitions.

As used in this article, the term:

(1) "Existing petroleum pipeline" shall have the same meaning as set forth in Code Section 12-17-1.

(2) "Expansion" shall have the same meaning as set forth in Code Section 12-17-1.

(3) "Extension" shall have the same meaning as set forth in Code Section 12-17-1.

(4) "Maintenance" shall have the same meaning as set forth in Code Section 12-17-1.

(5) "New petroleum pipeline" shall have the same meaning as set forth in Code Section 12-17-1.

(6) "Parallel petroleum pipeline" shall have the same meaning as set forth in Code Section 12-17-1.

(7) "Petroleum pipeline" shall have the same meaning as set forth in Code Section 12-17-1.

(8) "Petroleum pipeline company" shall have the same meaning as set forth in Code Section 12-17-1.

History. — Code 1981, § 22-3-80, enacted by Ga. L. 2017, p. 744, § 2/HB 413.

22-3-81. Right to acquire property or property interests by eminent domain.

Subject to the provisions, conditions, and restrictions of this article, petroleum pipeline companies are granted the power to acquire property or interests in property by eminent domain for the purpose of an expansion, an extension, maintenance, or construction of a new petroleum pipeline.

History. — Code 1981, § 22-3-81, enacted by Ga. L. 2017, p. 744, § 2/HB 413.

22-3-82. General certificate and permitting requirements.

(a) A petroleum pipeline company shall not exercise the power of eminent domain granted in Code Section 22-3-81 for the purpose of constructing a new petroleum pipeline or for an extension unless and until a certificate of public convenience and necessity is issued by the commissioner of transportation as provided in Code Section 22-3-83 and a permit is issued by the director of the Environmental Protection Division of the Department of Natural Resources as provided in Chapter 17 of Title 12.

(b) No certificate of public convenience and necessity or permit as provided in Code Section 22-3-83 shall be required of a petroleum pipeline company that is:

(1) Not exercising the power of eminent domain to acquire property; or

(2) Exercising the power of eminent domain for the purpose of maintenance or expansion.

History. — Code 1981, § 22-3-82, enacted by Ga. L. 2017, p. 744, § 2/HB 413.

22-3-83. Certificate of public convenience and necessity; requirements.

(a) On or after July 1, 2017, a petroleum pipeline company desiring to use the power of eminent domain granted under this article to acquire property for a new petroleum pipeline or an extension shall be required to obtain a certificate of public convenience and necessity from the commissioner of transportation as provided in this Code section.

(b) Any application for a certificate of public convenience and necessity shall contain, at a minimum:

(1) A description of the proposed project together with its siting information, including, but not limited to, a map showing the proposed location of the route of the new petroleum pipeline or of the proposed extension;

(2) A description of the public convenience and necessity that support the proposed location of the route of the new petroleum pipeline or of the proposed extension;

(3) The width of the proposed petroleum pipeline corridor up to a maximum width of one-third mile;

(4) A showing that the use of the power of eminent domain may be necessary for construction of the new petroleum pipeline or for the proposed extension;

(5) A showing that the public convenience and necessity for the petroleum pipeline justifies the use of the power of eminent domain; and

(6) Any other information that the Department of Transportation may require by rules and regulations.

(c) Within ten days of applying for a certificate of public convenience and necessity, the applicant shall provide:

(1) Public notice in the legal organ of each county through which the proposed route of the new petroleum pipeline or of the extension is to be located; and

(2) Written notice of the filing of an application under this Code section to all landowners whose property is located within the proposed route of the new petroleum pipeline or of the extension. Such notice shall be delivered to each landowner and contain the following language in boldface type:

"YOUR PROPERTY IS LOCATED WITHIN THE PROPOSED ROUTE OF A PETROLEUM PIPELINE FOR WHICH AN APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY HAS BEEN FILED PURSUANT TO ARTICLE 4 OF CHAPTER 3 OF TITLE 22 OF THE OFFICIAL CODE OF GEORGIA ANNOTATED. SAID ARTICLE ALONG WITH CHAPTER 17 OF TITLE 12 OF THE OFFICIAL CODE OF GEORGIA ANNOTATED PROVIDE SPECIFIC REQUIREMENTS WHICH MUST BE FOLLOWED BY PETROLEUM PIPELINE COMPANIES BEFORE THEY MAY BUILD A NEW PETROLEUM PIPELINE OR MODIFY AN EXISTING PETROLEUM PIPELINE. THESE PROVISIONS OF THE OFFICIAL CODE OF GEORGIA ANNOTATED ALSO PROVIDE SPECIFIC RIGHTS FOR YOUR PROTECTION. YOU SHOULD FAMILIARIZE YOURSELF WITH THOSE REQUIREMENTS AND YOUR RIGHTS."

(d)(1) In making a decision as to whether to grant a certificate of public convenience and necessity, the commissioner of transportation shall consider the following:

(A) Whether existing petroleum pipelines or distribution systems are adequate to meet the reasonable public needs;

(B) The volume of demand for such petroleum, and whether such demand and that reasonably to be anticipated in the future can support already existing petroleum pipelines and distribution

systems, if any, and also the petroleum pipeline or distribution system proposed by the applicant;

(C) The financial ability of the applicant to furnish adequate continuous service and to meet the financial obligations of the service which the applicant proposes to perform;

(D) The adequacy of the supply of petroleum to serve the public;

(E) The economic feasibility of the petroleum pipeline or distribution system and the propriety of the engineering and contracting fees, the expenses, and the financing charges and costs connected with the petroleum pipeline or distribution system; and

(F) The effect on existing revenues and service of other petroleum pipelines or distribution systems, and particularly whether the granting of such certificate of public convenience and necessity will or may seriously impair existing public service.

(2) This subsection shall not be construed as exhaustively describing all factors which the commissioner of transportation may consider in his or her decision to grant or deny a certificate of public convenience and necessity.

(e) The applicant shall bear the burden of proof to demonstrate that the commissioner of transportation should issue a certificate of public convenience and necessity as provided under this Code section. The decision to issue or deny a certificate of public convenience and necessity shall be based on the record before the commissioner of transportation, which shall include, but not be limited to, the applicant's submissions, any documents submitted to the Department of Transportation pursuant to subsection (d) of this Code section, and research the commissioner of transportation may conduct in analyzing the application.

(f) The issuance or denial of a certificate of public convenience and necessity may be reviewed by a judge of the superior court of the county in which the pipeline company has an agent and place of doing business. The review shall be by petition filed within 30 days of the date of approval or disapproval of the application and shall be determined on the basis of the record before the commissioner of transportation. The action of the commissioner of transportation shall be affirmed if supported by substantial evidence.

(g)(1) No later than July 1, 2018, the Department of Transportation shall, pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," promulgate such rules and regulations as are necessary and reasonable for purposes of enforcement of this Code section, which shall include, but may not be limited to:

(A) The submission of an application for a certificate of public convenience and necessity and provisions for the application review process, not to exceed 120 days in length;

(B) Provisions for a nonrefundable application fee which shall be sufficient to defray the administrative costs of review of the application by the Department of Transportation;

(C) Reasonable public notice of the filing of an application for a certificate of public convenience and necessity to a landowner who, after reasonable efforts, cannot personally be given the notice required in subsection (c) of this Code section; and

(D) Provisions for public meetings to be held prior to any action on any certificates of public convenience and necessity.

(2) No certificate of public convenience and necessity shall be granted by the commissioner of transportation prior to the promulgation of rules and regulations as provided for in this subsection; provided, however, that once such rules and regulations have been promulgated and applications are accepted for filing, if any application is not approved or is denied within 120 days of the date such application is filed with the Department of Transportation under this Code section, the application shall be deemed to be approved by operation of law.

History. — Code 1981, § 22-3-83, enacted by Ga. L. 2017, p. 744, § 2/HB 413; Ga. L. 2017, p. 774, § 22/HB 323.

Editor's notes. — Ga. L. 2017, p. 774, § 54(e)/HB 323, not codified by the General Assembly, provides: "In the event of a conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2017 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the conflict." Accordingly, the amendment to paragraph (a)(2) of this Code section by Ga. L. 2017, p. 774, § 22(2)/HB 323, was not given effect.

22-3-84. Notice to landowner.

Prior to initiating eminent domain proceedings or threatening to do so, the petroleum pipeline company shall cause to be delivered to each landowner whose property may be condemned a written notice containing the following language in boldface type:

"CHAPTER 17 OF TITLE 12 AND ARTICLE 4 OF CHAPTER 3 OF TITLE 22 OF THE OFFICIAL CODE OF GEORGIA ANNOTATED PROVIDE SPECIFIC REQUIREMENTS WHICH MUST BE FOLLOWED BY PETROLEUM PIPELINE COMPANIES BEFORE THEY MAY EXERCISE THE RIGHT TO CONDEMN YOUR PROPERTY. THOSE PROVISIONS OF THE OFFICIAL CODE OF GEORGIA ANNOTATED ALSO PROVIDE SPECIFIC RIGHTS FOR YOUR PRO-

TECTION. YOU SHOULD FAMILIARIZE YOURSELF WITH THOSE REQUIREMENTS AND YOUR RIGHTS PRIOR TO CONTINUING NEGOTIATIONS CONCERNING THE SALE OF YOUR PROPERTY TO A PETROLEUM PIPELINE COMPANY."

History. — Code 1981, § 22-3-84, enacted by Ga. L. 2017, p. 744, § 2/HB 413.

22-3-85. Use of condemnation procedures.

When a petroleum pipeline company that has met all the requirements of this article is unable to acquire the property or interest required for the purpose of an expansion, an extension, maintenance, or construction of a new petroleum pipeline, after reasonable negotiation with the owner of such property or interest, the petroleum pipeline company may acquire such property or interest by the use of the condemnation procedures authorized by Chapter 2 of this title.

History. — Code 1981, § 22-3-85, enacted by Ga. L. 2017, p. 744, § 2/HB 413; Ga. L. 2017, p. 774, § 22/HB 323.

Editor's notes. — Ga. L. 2017, p. 774, § 54(e)/HB 323, not codified by the General Assembly, provides: "In the event of a conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2017 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the conflict." Accordingly, the amendment to this Code section by Ga. L. 2017, p. 774, § 22(3)/HB 323, was not given effect.

ARTICLE 4A

NATURAL OR ARTIFICIAL GAS

RESEARCH REFERENCES

C.J.S. — 38A C.J.S., Gas and Oil, § 1 et seq.

22-3-95. Eminent domain use by natural gas transporters or distributors.

The power of eminent domain may be exercised by persons who are or may be engaged in constructing or operating pipelines for the transportation or distribution of natural or artificial gas and by persons who are or may be engaged in furnishing natural or artificial gas for heating, lighting, or power purposes in this state.

History. — Code 1981, § 22-3-95, enacted by Ga. L. 2016, p. 744, § 2/HB 1036.

ARTICLE 5

CONSTRUCTION AND OPERATION OF WATERSHED PROJECTS, FLOOD-CONTROL PROJECTS AND RELATED RECREATIONAL PROJECTS BY COUNTIES

OPINIONS OF THE ATTORNEY GENERAL

Counties may request federal administration of construction contracts under 16 U.S.C. § 1001 et seq. if such request is first approved by the State Soil and Water Conservation Committee. 1969 Op. Att'y Gen. No. 69-344.

RESEARCH REFERENCES

ALR. — Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 A.L.R. 676.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 A.L.R. 679.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 A.L.R.3d 1293.

Local use zoning of wetlands or flood plain as taking without compensation, 19 A.L.R.4th 756.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific cover, 26 A.L.R.4th 68.

22-3-100. Authority of counties to exercise power of eminent domain.

Every county of the State of Georgia may exercise the power of eminent domain for the purpose of taking and acquiring the property or other interests necessary:

(1) To enable the county to institute and to accomplish the completion of small watershed projects, works of improvements for watersheds, and projects for watershed protection and flood control and prevention under any applicable Act of the State of Georgia or act of the United States;

(2) For certain public parks, playgrounds, recreation centers, or other recreational facilities to be developed in connection with the development or construction of any small watershed project, any project for watershed protection or flood control and prevention, or works of improvements for watersheds; and

(3) To allow for ways of ingress to and egress from any and all such watershed projects, improvements of watershed projects, projects for watershed protection and flood control and prevention, and public

parks, playgrounds, recreation centers, or other recreational facilities.

History. — Ga. L. 1964, p. 234, §§ 1-3.

Cross references. — Granting of easements, rights of way to electric utilities for purposes of producing hydroelectric power from dam sites on property owned by governing authority of recreation system, § 36-64-3.1.

JUDICIAL DECISIONS

Property not used for purpose for which it was originally condemned may be devoted to another proper public use. Galloway v. Board of Comm'rs, 246 Ga. 472, 271 S.E.2d 784 (1980).

When a local governing authority has, in good faith, condemned property in fee simple for a public use, the condemnor, without the necessity for bringing another condemnation proceeding, may abandon the specific use for which the property was taken and devote the property to another public use. Galloway v. Board of Comm'rs, 246 Ga. 472, 271 S.E.2d 784 (1980).

Title to condemned property does not revert to original owner. — When a governing body condemns lands in fee simple, the failure to use the lands for the purpose for which they were condemned does not cause title to revert to the original owners. Galloway v. Board of Comm'rs, 246 Ga. 472, 271 S.E.2d 784 (1980).

Use of lakes on condemned property for recreation is proper. — The very existence of paragraph (2) of this section illustrates that when property condemned for watershed projects and flood control is not ultimately used for these purposes, using lakes on the property as public recreational facilities is a proper, alternative public use. Galloway v. Board of Comm'rs, 246 Ga. 472, 271 S.E.2d 784 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Intent of words "recreational centers or other recreational facilities, to be developed in connection with …" is that a proposed facility, which may be used for recreational purposes, must also have substantial, tangible watershed or flood control benefits. 1967 Op. Att'y Gen. No. 67-274.

Condemnation when project cosponsored by conservation district and county. — With respect to a small watershed project instituted under the cosponsorship of a soil and water conservation district and a county or counties either the district or the counties may condemn property for the project in compliance with the pertinent statutes. 1967 Op. Att'y Gen. No. 67-108.

No requirement that appraised amount be placed in trust prior to ruling. — It was not necessary for the agency bringing condemnation proceedings to place any appraised amount in trust prior to a court ruling; however, if assessors were appointed as provided in former Code 1933, § 36-1109 (see O.C.G.A. § 22-2-135), the condemning authority cannot appeal the assessors' award without tender of the amount of the award to the condemnee or payment into the registry of the court; also the full sum awarded in any condemnation proceeding must be tendered to the condemnee, or paid into court in the event the condemnee refused to accept payment, before the condemnor may enter upon, occupy, or subject the land to its use. 1967 Op. Att'y Gen. No. 67-108.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 5, 23 et seq., 112 et seq. 50 Am. Jur. 2d, Levees and Flood Control, § 2 et seq.

C.J.S. — 28A C.J.S., Easements, §§ 9 et seq., 123 et seq. 29A C.J.S., Eminent Domain, §§ 5 et seq., 22 et seq., 57 et seq.

ALR. — Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Right to condemn property in excess of needs for a particular public purpose, 6 A.L.R.3d 297.

Eminent domain: right to enter land for preliminary survey or examination, 29 A.L.R.3d 1104.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 A.L.R.3d 752.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

22-3-101. Condemnation procedure.

For the purposes designated in Code Section 22-3-100, every county of the State of Georgia may proceed to condemn the necessary property or other interest in accordance with the procedures set forth by the pertinent eminent domain statutes of this state and in accordance with all existing laws applicable to the condemnation of private property for public use, including Article 2 of Chapter 2 of this title.

History. — Ga. L. 1964, p. 234, § 4.

RESEARCH REFERENCES

ALR. — Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 A.L.R.2d 346.

22-3-102. Requirement of condemnation of fee simple title to land to be flooded permanently.

In any proceeding under this article, the condemnor shall be required to condemn the fee simple title to all land not otherwise acquired which will be covered by permanent flooding.

History. — Ga. L. 1964, p. 234, § 5.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 144 et seq., 290 et seq. 27 Am. Jur. 2d, Eminent Domain, § 316 et seq.

ARTICLE 6

CONSTRUCTION OF LIGHTHOUSES AND OTHER NAVIGATIONAL AIDS BY UNITED STATES GOVERNMENT

Cross references. — Authority of Department of Transportation to exercise power of eminent domain for construction and maintenance of intracoastal waterway, § 52-3-5.

RESEARCH REFERENCES

ALR. — Power of eminent domain as exercisable by state or one of its political subdivisions for benefit of federal government, or by federal government exclusively under state authority, 143 A.L.R. 1040.

22-3-120. Condemnation for construction of lighthouses, beacons, and other navigational aides.

In any county in which the United States government authorizes the construction of lighthouses, beacons, range lights, or any other structure designed to assist the navigation of the waters of this state, any proper agency of the United States and the mayor of any city in that county shall mark out, by metes and bounds, the property necessary to be taken and shall convey to the owner of the property or of any interest therein notice of the planned construction. If the agency of the United States and the owner cannot agree on the compensation to be paid for taking the land, the Governor shall appoint one person and the owner of the land another; and these two shall select a third person. The three persons so selected shall constitute a commission to assess the just and adequate compensation to be paid according to the general method of condemning land provided in Article 1 of Chapter 2 of this title.

History. — Ga. L. 1882-83, p. 118, § 1; Civil Code 1895, § 26; Civil Code 1910, § 27; Code 1933, § 36-1101.

JUDICIAL DECISIONS

This section does not require condemning authority to make effort to purchase by private contract as a condition precedent to the institution of condemnation proceedings thereunder. Varnadoe v. Housing Auth., 221 Ga. 467, 145 S.E.2d 493 (1965).

Selection of what and how much

property will be taken for a needed public use by a condemning authority will not be interfered with or controlled by the courts unless such selection is made in bad faith or beyond the power conferred by law. Varnadoe v. Housing Auth., 221 Ga. 467, 145 S.E.2d 493 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 87 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 27 et seq.

ALR. — Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 A.L.R.2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Right to condemn property in excess of needs for a particular public purpose, 6 A.L.R.3d 297.

Eminent domain: right to enter land for preliminary survey or examination, 29 A.L.R.3d 1104.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

22-3-121. Acquisition of right to enter lands and clear or cut timber for purposes of carrying out survey of coasts — Generally.

Any person employed under the act of the Congress of the United States providing for a survey of the coasts may enter upon lands within this state and clear or cut timber upon the same for any purpose legitimately connected with and necessary to carry out the survey, provided that no unnecessary injury be done thereby and all damages to the owner of the land be promptly paid.

History. — Laws 1847, Cobb's 1851 Digest, p. 155; Code 1863, § 25; Code 1868, § 23; Code 1873, § 23; Code 1882, § 23; Civil Code 1895, § 27; Civil Code 1910, § 28; Code 1933, § 36-1102.

U.S. Code. — The federal Act referred to in this section is codified at 33 U.S.C. § 883a, which provides for the activities which the director of the Coast and Geodetic Survey is authorized to conduct.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Logs and Timber, § 1 et seq.

C.J.S. — 54 C.J.S., Logs and Logging, § 1 et seq.

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

22-3-122. Acquisition of right to enter lands and clear or cut timber for purposes of carrying out survey of coasts — Manner of assessment where parties cannot agree on compensation.

If the parties representing the government of the United States and the owner of the property or of any interest therein pursuant to Code Section 22-3-121 cannot agree upon the amount of compensation to be paid for the property, the damages shall be assessed as provided in this title.

History. — Laws 1847, Cobb's 1851 Digest, p. 155; Code 1863, § 26; Code 1868, § 24; Code 1873, § 24; Code 1882, § 24; Civil Code 1895, § 28; Civil Code 1910, § 29; Code 1933, § 36-1103.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 112 et seq., 281 et seq.

C.J.S. — 54 C.J.S., Logs and Logging, § 1 et seq.

ALR. — Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 A.L.R.2d 791.

Good will as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 A.L.R.3d 752.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 A.L.R.3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

ARTICLE 7

OWNERSHIP OR OPERATION OF UTILITY SYSTEMS

Cross references. — Acquisition and construction of water and sewage systems, § 36-34-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 61.

C.J.S. — 29A C.J.S., Eminent Domain, § 94 et seq.

22-3-140. Authorization to utilize the declaration of taking method of eminent domain.

Any state agency, political subdivision of the state, county, or municipality owning or operating a sewage collection, treatment, or disposal system, a water or waste-water system, a gas or gas line system, an electrical or electrical line system, or a drain or storm-water system is authorized to utilize the declaration of taking method of eminent domain in order to acquire any private property in fee simple or in any lesser interest, including easements, for such systems and purposes, as such method of eminent domain is provided in Article 1 of Chapter 3 of Title 32. This article and method of eminent domain shall be supplementary to and cumulative of the methods of procedure for the exercise of the power of eminent domain prescribed in this title.

History. — Code 1981, § 22-3-140, enacted by Ga. L. 2000, p. 1514, § 3.

ARTICLE 8

ELECTRIC TRANSMISSION LINES

Editor's notes. — Ga. L. 2004, p. 568, § 3, not codified by the General Assembly, provides that this article: "shall apply to the exercise of eminent domain to acquire easements or other property interests for which land acquisition negotiations for purposes of constructing or expanding one or more electric transmission lines begin on or after such date. The provisions of this Act relating to additional compensation, reconveyance, and quitclaim shall apply to easements and other property interests acquired on or after July 1, 2004, through the exercise of eminent domain."

Law reviews. — For article on the 2004 enactment of this article, see 21 Ga. St. U.L. Rev. 157 (2004).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 61.

C.J.S. — 29A C.J.S., Eminent Domain, § 94 et seq.

22-3-160. "Utility" defined.

As used in this article, the term "utility" means a person, corporation, or other entity that generates, transmits, distributes, supplies, or sells electricity for public or private use in this state or generates electricity in this state for transmission or distribution outside this state.

History. — Code 1981, § 22-3-160, enacted by Ga. L. 2005, p. 60, § 22/HB 95.

Editor's notes. — Ga. L. 2005, p. 60, § 22, redesignated the former provisions of this Code section as Code Section 22-3-160.1 and enacted the present provisions.

22-3-160.1. Public hearings required; exception to hearing requirement.

(a) Before exercising the right of eminent domain for purposes of constructing or expanding an electric transmission line with a design operating voltage of 115 kilovolts or greater and a length of one mile or more, any utility shall schedule and hold one or more public meetings with an opportunity for comment by members of the public. In any proceeding to exercise the right of eminent domain for purposes of an electric transmission line for which the utility began land acquisition negotiations on or after July 1, 2004, the utility shall be required to demonstrate substantial compliance with this Code section as a condition for exercising the right of eminent domain.

(b) Prior to the public meeting or meetings required by this Code section, the utility shall provide adequate public notice of the utility's intent to construct or expand an electric transmission line and adequate public notice of the public meeting or meetings related to the electric transmission line as follows:

(1) By publishing adequate public notice of said public meeting or meetings in a newspaper of general circulation in each county in which any portion of the electric transmission line is to be constructed or expanded. Said notice shall be published at least 30 days prior to the date of the first public meeting related to the electric transmission line and shall include the following: the date, time, and location of each meeting; a statement that the purpose of the meeting or meetings is to provide public notice of the utility's intent to construct or expand an electric transmission line for which the right of eminent domain may be exercised; a description of the proposed project including the general route of the electric transmission line and the general property area within which the utility intends to construct or expand the electric transmission line; the width of the proposed transmission line route; and a description of the alternative construction approaches considered by the utility and a statement of why such alternatives were rejected by the utility; and

(2) By providing written notice of the public meeting or meetings, by means of certified mail, to each owner of property, as indicated in the tax records of the county in which such property is located, over which the utility intends to construct or expand the electric transmission line and to the chairpersons or chief executives of the counties and the mayors of any municipalities in which such property is located. Such notice shall be mailed at least 30 days prior to the date of the first public meeting related to the electric transmission line and shall include all of the information required by paragraph (1) of this subsection.

(c) At least one public meeting shall be held in each county in which the electric transmission line would be located. In any county in which the electric transmission line would require acquisition of property rights from more than 50 property owners, two or more public meetings shall be held. The public meetings shall be held in an accessible location and shall be open to members of the public. At least one of the public meetings shall commence between 6:00 P.M. and 7:00 P.M., inclusive, on a business weekday. At the public meetings, the utility shall provide a description of the proposed project including the general route of the electric transmission line and the general property area within which the utility intends to construct or expand the electric transmission line, the width of the proposed transmission line route, and a description of the alternative construction approaches considered by the utility and a statement of why such alternatives were rejected by the utility. At the public meetings, the utility shall allow a reasonable opportunity for members of the public to express their views on the proposed project and to ask questions.

(d) A utility shall not be required to give notice of or hold public meetings with respect to any of the following:

(1) An electric transmission line to be constructed or expanded by a utility on an established right of way or land that was acquired by the utility or any other utility prior to July 1, 2004;

(2) An electric transmission line for which the utility began land acquisition negotiations prior to July 1, 2004;

(3) An electric transmission line to be constructed or expanded by a utility on an established right of way or land that is owned or controlled by a state agency, a county, a municipality, or an agency, bureau, or department of the United States;

(4) An electric transmission line to be constructed or expanded by a utility for the purpose of relocating an existing electric transmission line at the direction, order, or request of a state agency, a county, a municipality, or an agency, bureau, or department of the United States;

(5) An electric transmission line to be constructed or expanded by a utility without exercising the power of eminent domain to acquire the right of way or easement area for such line; or

(6) An electric transmission line to be constructed by a utility for the purpose of serving an electric substation or switching station to be constructed on a site that is owned or controlled by a utility customer to be served by such substation or switching station.

History. — Code 1981, § 22-3-160, enacted by Ga. L. 2004, p. 568, § 2; Code 1981, § 22-3-160.1, as redesignated by Ga. L. 2005, p. 60, § 22/HB 95.

22-3-161. Selection of route for electric transmission line; settlement negotiations with property owners.

(a) On and after July 1, 2004, before exercising the right of eminent domain for purposes of constructing or expanding an electric transmission line described in subsection (a) of Code Section 22-3-160.1, the utility shall select a practical and feasible route for the location of the electric transmission line. In selecting the route for the location of the electric transmission line, the utility shall consider existing land uses in the geographic area where the line is to be located, existing corridors, existing environmental conditions in the area, engineering practices related to the construction and operation of the line, and costs related to the construction, operation, and maintenance of the line.

(b) After the utility has selected the preferred route for the location of an electric transmission line, the utility shall attempt in good faith to negotiate a settlement with each property owner from whom the utility needs to acquire property rights for the line. In connection with the negotiations, the utility shall provide the property owner with a written offer to purchase the property rights, a document that describes the property rights, and a drawing that shows the location of the line on the owner's property.

(c) The requirements of subsections (a) and (b) of this Code section shall not apply to an electric transmission line described in subsection (d) of Code Section 22-3-160.1.

History. — Code 1981, § 22-3-161, enacted by Ga. L. 2004, p. 568, § 2; Ga. L. 2005, p. 60, § 22/HB 95.

22-3-162. Application; additional compensation or reconveyance.

(a) This Code section shall apply to any easement or other property interest acquired on or after July 1, 2004, through exercise of the right of eminent domain for purposes of constructing or expanding an electric transmission line:

(1) With a capacity of 230 kilovolts or less if the utility has not begun such construction or expansion within 12 years from the date of acquisition and the land burdened by the easement or other property interest is not adjacent to an electric transmission line corridor in existence 12 years from the date of acquisition;

(2) With a capacity of more than 230 kilovolts if the utility has not begun such construction or expansion within 15 years from the date of acquisition and the land burdened by the easement or other

property interest is not adjacent to an electric transmission line corridor in existence 15 years from the date of acquisition; and

(3) Of any capacity if the land burdened by the easement or other property interest is adjacent to an electric transmission line corridor in existence 15 years after the date of acquisition and the utility has not begun the construction or expansion for which the easement or other property right was acquired within 15 years from the date of acquisition.

(b) When this Code section becomes applicable to an easement or other property interest, the owner of the land burdened by such easement or property interest may apply to the utility that acquired the easement or other property interest or such utility's successor or assign for reconveyance or quitclaim of the easement or other property interest or for additional compensation for such easement or other property interest. The application shall be in writing, and the utility or its successor or assign shall act on the application within 60 days by:

(1) Executing a reconveyance or quitclaim of the easement or property interest upon receipt of compensation not to exceed the amount of the compensation paid by the utility for the easement or property interest at the time of acquisition; or

(2) Paying additional compensation to the owner of the land burdened by the easement or other property interest, such compensation to be calculated by subtracting the price paid by the utility for the easement or other property interest at the time of acquisition from the fair market value of the easement or other property interest at the time this Code section becomes applicable to such easement or other property interest.

(c) The choice between additional compensation or reconveyance or quitclaim shall be at the discretion of the utility or its successor or assign.

History. — Code 1981, § 22-3-162, enacted by Ga. L. 2004, p. 568, § 2.

Law reviews. — For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

CHAPTER 4

RELOCATION ASSISTANCE AND LAND ACQUISITION FOR THOSE DISPLACED BY FEDERAL-AID PROJECTS

Sec.
22-4-1. Short title; "Uniform Act" defined.
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22-4-3. Applicability of Code Section 22-1-1 to chapter.
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22-4-12. Functions provided in chapter as public purposes; effect of chapter on power to tax.
22-4-13. Payments under chapter as income or resources.
22-4-14. Effect of chapter on condemnation proceedings.
22-4-15. Authority of public entities to provide replacement housing when federal-aid project cannot proceed to actual construction.

Cross references. — Private ways and specific powers, Ga. Const. 1983, Art. I, Sec. III, Para. II, and Art. III, Sec. VI, Para. II. Housing generally, T. 8, C. 3. Clearance and rehabilitation of blighted areas, T. 8, C. 4. Relocation assistance for individuals and businesses displaced by federal-aid and state-aid highway projects, T. 32, C. 8.

Law reviews. — For survey article on recent developments in Georgia law of remedies, see 34 Mercer L. Rev. 397 (1982). For annual survey article on local government law, see 52 Mercer L. Rev. 341 (2000).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state relocation assistance laws, 49 A.L.R.4th 491.

22-4-1. Short title; "Uniform Act" defined.

(a) This chapter shall be known as "The Georgia Relocation Assistance and Land Acquisition Policy Act."

(b) As used in this chapter, the term "Uniform Act" means the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended by the Uniform Relocation Act Amendments of 1987, Title IV of Public Law 100-17.

History. — Ga. L. 1973, p. 512, § 1; Ga. L. 1989, p. 213, § 1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, quotation marks that enclosed "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970," and "Uniform Relocation Act Amendments of 1987," were deleted in subsection (b).

JUDICIAL DECISIONS

Cited in DeKalb County v. United Family Life Ins. Co., 235 Ga. 417, 219 S.E.2d 707 (1975); DOT v. Doss, 238 Ga. 480, 233 S.E.2d 144 (1977); City of Atlanta v. Rosebush, 146 Ga. App. 99, 245 S.E.2d 440 (1978).

22-4-2. Legislative findings and declaration of necessity.

The General Assembly finds and declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced when the state, any of its agencies or institutions (other than the Department of Transportation), or any county, municipal corporation, school district, political subdivision, public authority, public agency, public corporation, or public instrumentality, excluding electric membership corporations as defined in paragraph (3) of Code Section 46-3-171, (collectively referred to in this chapter as "several public entities") created under the Constitution and laws of the State of Georgia acquires land, with federal financial assistance, for a public use, are necessary to ensure that certain individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. The General Assembly finds and declares that the establishment of uniform fair land acquisition policies will be beneficial to the public. The General Assembly finds that the Congress of the United States has, by enacting the Uniform Act, made funds available for relocation assistance and the implementation of certain land acquisition policies. The General Assembly further finds that the Congress of the United States has by the aforesaid statute provided for the total cessation after July 1, 1972, of federal financial assistance for public works projects which will displace persons or businesses unless the state complies with the requirements of the Uniform Act. The General Assembly finds and declares that the construction of public works projects with federal financial assistance is vital to the state and is in the best interest of the people of the state and

that providing for the continuation of federal financial assistance at the highest possible level for public works projects is a legitimate public purpose. The General Assembly further finds that the cost of providing the assistance and services provided for in this chapter should be, and the same are declared to be, part of the necessary cost of federal-aid public works projects.

History. — Ga. L. 1973, p. 512, § 2; Ga. L. 1989, p. 213, § 2; Ga. L. 1990, p. 8, § 22.

Cross references. — Federal financial aid for rehabilitation and redevelopment of blighted areas, § 8-4-10.

JUDICIAL DECISIONS

This chapter does not create additional elements compensable under eminent domain laws, but provides supplemental assistance for particular losses incurred by reason of dislocation. DeKalb County v. United Family Life Ins. Co., 235 Ga. 417, 219 S.E.2d 707 (1975).

22-4-3. Applicability of Code Section 22-1-1 to chapter.

The definitions contained in paragraphs (6) and (8) of Code Section 22-1-1 shall not apply to this chapter.

History. — Code 1981, § 22-4-3, Ga. L. 2006, p. 39, § 17/HB 1313.

Editor's notes. — This Code section was created as part of the Code revision and was thus enacted by Ga. L. 1981, Ex. Sess., p. 8.

Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

22-4-4. Payments by public entities for relocation and replacement housing expenses.

The several public entities are authorized to and shall make or approve the payments required by Section 210 of the Uniform Act for the relocation expenses and replacement housing expenses of any person, family, business, farm operation, or nonprofit organization displaced by federal-aid projects in the state, the costs of which are now or hereafter financed in whole or in part from federal funds allocated to any of the several public entities.

History. — Ga. L. 1973, p. 512, § 3; Ga. L. 1989, p. 213, § 3.

22-4-5. Providing of relocation assistance advisory services by public entities.

The several public entities are authorized to and shall provide the relocation assistance advisory services required by Section 205 of the Uniform Act for any person, family, business, farm operation, or nonprofit organization displaced by federal-aid projects in the state, the costs of which are now or hereafter financed in whole or in part from federal funds allocated to any of the several public entities.

History. — Ga. L. 1973, p. 512, § 4; Ga. L. 1989, p. 213, § 4.

22-4-6. Payments by public entities for expenses incidental to property transfer, for mortgage penalties, and for property taxes.

The several public entities are authorized to and shall make or approve the payments required by Section 305(2) of the Uniform Act for expenses incidental to the transfer of real property acquired by any of the several public entities, for prepayment of mortgage penalties, and for a pro rata portion of real property taxes on real property acquired by any of the several public entities from any person, family, business, farm operation, or nonprofit organization displaced by federal-aid projects in the state, the costs of which are now or hereafter financed in whole or in part from federal funds allocated to any of the several public entities.

History. — Ga. L. 1973, p. 512, § 5; Ga. L. 1989, p. 213, § 5.

JUDICIAL DECISIONS

This chapter does not require nor permit recovery of prepayment penalties as item of damages when federal funds are involved because such damages are not an item of damages under Georgia law. DeKalb County v. United Family Life Ins. Co., 235 Ga. 417, 219 S.E.2d 707 (1975).

RESEARCH REFERENCES

ALR. — Compensation for interest prepayment penalty in eminent domain proceedings, 84 A.L.R.3d 946.

22-4-7. Payments by public entities for litigation expenses in condemnation proceedings.

The several public entities are authorized to and shall make or approve the payments required by Section 305(2) of the Uniform Act for

litigation expenses actually incurred by any person, family, business, farm operation, or nonprofit organization which is a condemnee in any condemnation proceeding brought by an acquiring public entity to acquire real property for a federal-aid project, the cost of which is now or hereafter financed in whole or in part from federal funds allocated to an acquiring public entity, if the final judgment is that the acquiring public entity cannot acquire the real property by condemnation or the condemnation proceeding is formally abandoned by the acquiring public entity.

History. — Ga. L. 1973, p. 512, § 6; Ga. L. 1989, p. 213, § 6.

JUDICIAL DECISIONS

Statutory authority for payment of litigation expenses is separate and apart from condemnation proceeding. City of Atlanta v. Rosebush, 146 Ga. App. 99, 245 S.E.2d 440 (1978).

O.C.G.A. § 22-4-7 provides a remedy to recover attorney fees separate and apart from a condemnation proceeding when just and adequate compensation is at issue. DOT v. B & G Realty, Inc., 197 Ga. App. 613, 398 S.E.2d 762 (1990).

This section does not require that entire project for which land is condemned be abandoned, but only that the condemnation proceeding be abandoned. Jackson v. Alford, 244 Ga. 125, 259 S.E.2d 68 (1979).

Reasonable expenses incurred by defendants prior to receiving notice of dismissal are recoverable litigation expenses. Jackson v. Alford, 244 Ga. 125, 259 S.E.2d 68 (1979).

Expenses of litigation, including attorney fees, must be paid by city, whether or not the city has established rules under Ga. L. 1973, p. 512, § 11 (see O.C.G.A. § 22-4-11) for administering the payments; in the absence of such rules and regulations, mandamus is an appropriate means by which to compel the performance of city officials in compliance with Ga. L. 1973, p. 512, § 6 (see O.C.G.A. § 22-4-7). Jackson v. Alford, 244 Ga. 125, 259 S.E.2d 68 (1979).

Cited in West v. Mayor of Atlanta, 248 Ga. 844, 286 S.E.2d 299 (1982).

22-4-8. Payments by public entities for litigation expenses in inverse condemnation proceedings.

The several public entities are authorized to and shall make or approve the payments required by Section 305(2) of the Uniform Act for litigation expenses actually incurred by any person, family, business, farm operation, or nonprofit organization which is the plaintiff in any inverse condemnation proceeding brought against an acquiring public entity in which judgment is rendered in favor of the plaintiff for real property taken by the acquiring public entity in its execution of any federal-aid project, the costs of which are now or hereafter financed in whole or in part from federal funds allocated to the acquiring public entity.

History. — Ga. L. 1973, p. 512, § 7; Ga. L. 1989, p. 213, § 7.

Law reviews. — For survey article on recent developments in Georgia law of

remedies, see 34 Mercer L. Rev. 397 (1982).

JUDICIAL DECISIONS

No right of action for expenses against city. — When condemnation was for purpose of acquiring land necessary for transit authority, fact that city institutes eminent domain proceedings in and of itself gives no right of action for expenses against the city under O.C.G.A. § 22-4-8. When the city is the legal condemnor, the transit authority, not the city, is the acquiring public entity for purposes of § 22-4-8. West v. Mayor of Atlanta, 248 Ga. 844, 286 S.E.2d 299 (1982).

Prerequisite to right to compensation. — Plaintiffs could not seek compensation under O.C.G.A. § 22-4-8 when the plaintiffs did not prevail in their inverse condemnation action. Benton v. Savannah Airport Comm'n, 241 Ga. App. 536, 525 S.E.2d 383 (1999).

22-4-9. Policies guiding acquisition of real property for federal-aid projects.

In acquiring real property for any federal-aid project, the costs of which are financed in whole or in part from federal funds allocated to an acquiring public entity, such public entity shall be guided by the land acquisition policies required by Section 301 of the Uniform Act to the greatest extent practicable.

History. — Ga. L. 1973, p. 512, § 8; Ga. L. 1989, p. 213, § 8.

JUDICIAL DECISIONS

No private right of action. — O.C.G.A. § 22-4-9 does not create a private right of action in favor of a landowner, but merely addresses policies that should guide state agencies when the agencies acquire real property for federal-aid projects. Benton v. Savannah Airport Comm'n, 241 Ga. App. 536, 525 S.E.2d 383 (1999).

Neither the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4601 et seq., nor the Georgia Relocation Assistance and Land Acquisition Policy Act, O.C.G.A. § 22-4-1 et seq., gave condemnees whose land was subjected to an inadequately described temporary work easement a private right of action. Ga. 400 Indus. Park, Inc. v. DOT, 274 Ga. App. 153, 616 S.E.2d 903 (2005).

22-4-10. Policies guiding acquisition of buildings, structures, and other improvements for federal-aid projects.

In acquiring property for any federal-aid project, the costs of which are financed in whole or in part from federal funds allocated to an acquiring public entity, the acquiring public entity shall be guided by the land acquisition policies relating to buildings, structures, and other improvements specified by Section (302) of the Uniform Act to the greatest extent practicable.

History. — Ga. L. 1973, p. 512, § 9; Ga. L. 1989, p. 213, § 9; Ga. L. 1990, p. 8, § 22.

22-4-11. Adoption of rules; appeal and review.

(a) The several public entities are authorized to make such rules as may be necessary to provide for the administration of the financial assistance authorized by this chapter.

(b) The determination by the several public entities of the amount of any payment and to whom it shall be paid may be appealed and judicially reviewed in the manner prescribed by Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

History. — Ga. L. 1973, p. 512, § 11.

JUDICIAL DECISIONS

Judicial review provided by Ga. L. 1964, p. 338, § 1 (see O.C.G.A. T. 50, C. 13) is applicable to "several public entities" as defined by Ga. L. 1973, p. 512, § 2 (see O.C.G.A. § 22-4-2) as well as to those entities defined as an "agency" by Ga. L. 1975, p. 404, § 3 (see O.C.G.A. § 50-13-2(1)). Wirt v. Metropolitan Atlanta Rapid Transit Auth., 139 Ga. App. 592, 229 S.E.2d 100 (1976).

Amendments to definition of "agency" will not influence such applicability. — "Several public entities" and the "agency" being alternative categories, amendments to the definition of "agency" will not influence the applicability of Ga. L. 1964, p. 338, § 1 (see O.C.G.A. T. 50, C. 13) to an entity which falls within the "several public entities" category. Wirt v. Metropolitan Atlanta Rapid Transit Auth., 139 Ga. App. 592, 229 S.E.2d 100 (1976).

Expenses of litigation, including attorney fees, must be paid by city, whether or not the city has established rules under Ga. L. 1973, p. 512, § 11 (see O.C.G.A. § 22-4-11) for administering the payments; in the absence of such rules and regulations, mandamus is an appropriate means by which to compel the performance of city officials in compliance with Ga. L. 1973, p. 512, § 5 (see O.C.G.A. § 22-4-6). Jackson v. Alford, 244 Ga. 125, 259 S.E.2d 68 (1979).

Cited in City of Atlanta v. Rosebush, 146 Ga. App. 99, 245 S.E.2d 440 (1978); Metropolitan Atlanta Rapid Transit Auth. v. Wallace, 243 Ga. 491, 254 S.E.2d 822 (1979).

22-4-11.1. Exercise of powers granted under this chapter by municipal corporations with population of 350,000 or more; effect of this Code section on other laws.

(a) In addition and supplementary to other powers provided by this chapter for the several public entities, any municipal corporation having a population of 350,000 or more according to the United States decennial census of 1970 or any future such census may exercise the powers provided by this chapter for public works projects which are not financed in whole or in part from federal funds, but which are financed wholly or in part from the funds of any such municipal corporation or from other nonfederal funding sources, if the governing authority of any

such municipal corporation shall first pass an ordinance or resolution stipulating that such funds are to be spent in good faith anticipation of whole or partial reimbursement from federal funds. The costs incurred by any such municipal corporation pursuant to the authority provided by this Code section shall be a part of the costs of public works projects. In carrying out the powers granted under this Code section any such municipal corporation shall be authorized to:

(1) Provide all relocation assistance and payments as authorized by this chapter;

(2) Establish and implement all acquisition policies and practices authorized under this chapter; and

(3) Provide for reimbursement of all necessary expenses authorized under this chapter.

(b) This Code section shall not be construed to repeal or affect in any manner Code Section 32-8-1, relating to relocation assistance for persons displaced by federal-aid highway projects.

History. — Ga. L. 1981, p. 1417, §§ 1, 2; Ga. L. 1991, p. 307, § 1.

22-4-12. Functions provided in chapter as public purposes; effect of chapter on power to tax.

(a) The providing of all of the relocation assistances and payments described in this chapter and, in connection with the acquisition of real property for public works projects or programs, the establishing of all of the policies and practices described in this chapter, and the paying or reimbursing of all of the expenses described in this chapter are declared to be necessary and shall and do constitute governmental functions undertaken for public purposes. Therefore, public funds may be expended by said public entities in furtherance of such functions, and those public entities that possess the power of taxation in relation to the public works projects and programs referred to in this subsection may exercise such power in furtherance thereof.

(b) Nothing contained in this Code section should be construed as a grant of a power of taxation to any of the several public entities which do not possess, independently of this chapter, any powers of taxation. Rather, this Code section shall constitute a grant of the power of taxation in relation to the public purposes enumerated in subsection (a) of this Code section to such of the several public entities as possess, independently of this chapter, powers of taxation in relation to the particular public works project or program which is undertaken or sponsored by such public entity and which displaces a person, thereby giving rise to the necessity of relocation assistance and payments, or

which requires the acquisition of real property, thereby necessitating the real property acquisition policies, practices, payments, and reimbursements described in this chapter.

History. — Ga. L. 1973, p. 512, § 12.

22-4-13. Payments under chapter as income or resources.

No payment received by a displaced person under this chapter shall be considered as income or resources for the purpose of determining the eligibility or extent of eligibility of any person for assistance under any state law or for the purposes of the state's personal income tax law, corporation tax law, or other tax laws. These payments shall not be considered as income or resources of any recipient of public assistance, and the payment shall not be deducted from the amount of aid to which the recipient would otherwise be entitled.

History. — Ga. L. 1973, p. 512, § 13.

22-4-14. Effect of chapter on condemnation proceedings.

Nothing contained in this chapter shall be construed as creating in any condemnation proceeding brought under the power of eminent domain any element of value or of damage.

History. — Ga. L. 1973, p. 512, § 10.

JUDICIAL DECISIONS

Georgia jurisprudence will set measure of damages for property condemned in Georgia. DeKalb County v. United Family Life Ins. Co., 235 Ga. 417, 219 S.E.2d 707 (1975).

Cited in United Family Life Ins. Co. v. DeKalb County, 136 Ga. App. 822, 222 S.E.2d 664 (1975); DOT v. Doss, 238 Ga. 480, 233 S.E.2d 144 (1977); City of Atlanta v. Rosebush, 146 Ga. App. 99, 245 S.E.2d 440 (1978).

RESEARCH REFERENCES

ALR. — Compensation for interest prepayment penalty in eminent domain proceedings, 84 A.L.R.3d 946.

22-4-15. Authority of public entities to provide replacement housing when federal-aid project cannot proceed to actual construction.

The several public entities shall have the authority, as a last resort, to provide replacement housing when a federal-aid project financed in whole or in part with federal aid cannot proceed to actual construction

because no comparable replacement sale or rental housing is available. In carrying out the relocation assistance activities, the several public entities shall be authorized to make payments, construct or reconstruct with their own forces, cause to be constructed or reconstructed, and purchase by deed or condemnation any real property for the purposes of providing replacement housing. The acquiring public entity may exchange, lease, or sell to the displaced person such replacement housing. Whenever any real property has been acquired under this Code section and thereafter the acquiring public entity determines that all or any part of such property or any interest therein is no longer needed for such purposes because of changed conditions, the acquiring public entity is authorized to dispose of such property or interest therein in accordance with Code Section 50-16-144.

History. — Code 1981, § 22-4-15, enacted by Ga. L. 1989, p. 213, § 10.

TITLE 23

EQUITY

Chap.

1. General Provisions, 23-1-1 through 23-1-25.

2. Grounds for Equitable Relief, 23-2-1 through 23-2-136.

3. Equitable Remedies And Proceedings Generally, 23-3-1 through 23-3-127.

4. Equity Procedure, 23-4-1 through 23-4-38.

Cross references. — Exercise of judicial power, Ga. Const. 1983, Art. VI, Sec. I, Para. IV. Venue for equity cases, Ga. Const. 1983, Art. VI, Sec. II, Para. III. Granting of injunctions generally, T. 9, C. 5. Venue for actions in equity generally, § 9-10-30. Trusts generally, T. 53, C. 12.

CHAPTER 1

GENERAL PROVISIONS

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23-1-1. Equity jurisdiction vested in superior courts and State-wide Business Court.

All equity jurisdiction shall be vested in the superior courts of the several counties and in the Georgia State-wide Business Court as provided in Code Section 15-5A-3.

History. — Laws 1799, Cobb's 1851 Digest, p. 467; Code 1863, § 3013; Code 1868, § 3025; Code 1873, § 3080; Code 1882, § 3080; Civil Code 1895, § 3921; Civil Code 1910, § 4518; Code 1933, § 37-101; Ga. L. 2019, p. 845, § 3-4/HB 239.

The 2019 amendment, effective May 7, 2019, added "and in the Georgia State-wide Business Court as provided in Code Section 15-5A-3" at the end of this Code section.

Cross references. — Exercise of judicial power, Ga. Const. 1983, Art. VI, Sec. I, Para. IV.

Law reviews. — For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 1 (2019).

JUDICIAL DECISIONS

Equity determined by allegations contained in petition. — Whether an action is one at law or in equity is determined by the allegations of the petition and the nature of the relief prayed and not by the designation given to the action by the pleader. Griffin v. Securities Inv. Co., 181 Ga. 455, 182 S.E. 594 (1935).

Equity jurisdiction is conferred upon the superior courts and not upon the judges thereof, and judges sitting in vacation are not courts of equity.

Humber v. Garrard, 205 Ga. 357, 53 S.E.2d 748 (1949).

Equity had jurisdiction to render decrees in open court authorizing the several trustees to contract for loans and secure the loans by deed conveying the trust property. Jackson v. Massachusetts Mut. Life Ins. Co., 183 Ga. 659, 189 S.E. 243 (1936).

In an equitable proceeding, it is the general rule that all persons having a legal or equitable interest in the subject matter of the suit must be made parties; and no court should undertake to reform a written instrument in an essential matter, without having before it all the parties to be affected by the proposed reformation. American Fid. & Cas. Co. v. Elder, 189 Ga. 229, 5 S.E.2d 668 (1939).

Federal jurisdiction. — Since an action to set aside award of year's support to widow for fraud could be brought in superior courts of the state, it might be brought in federal court, assuming that all other jurisdictional prerequisites had been satisfied. Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982).

State court had jurisdiction over unjust enrichment claim. — State court had jurisdiction to give an award based on the equitable theory of unjust enrichment because the plaintiffs, the buyers of a sports bar, sought only damages against the sellers, not equitable relief. Lee v. Shim, 310 Ga. App. 725, 713 S.E.2d 906 (2011).

Cited in Watters v. Southern Brighton Mills, 168 Ga. 15, 147 S.E. 87 (1929); Lamb v. Lamb, 169 Ga. 567, 150 S.E. 817 (1929); Biddle v. Papa, 180 Ga. 468, 179 S.E. 357 (1935); McDowell v. McDowell, 68 Ga. App. 363, 22 S.E.2d 851 (1942); Rockefeller v. First Nat'l Bank, 213 Ga. 493, 100 S.E.2d 279 (1957); Miller v. New Amsterdam Cas. Co., 105 Ga. App. 174, 123 S.E.2d 717 (1961); Moody v. Mendenhall, 238 Ga. 689, 234 S.E.2d 905 (1977); Country Greens Village One Owners Ass'n v. Meyers, 158 Ga. App. 609, 281 S.E.2d 346 (1981); Southeast Serv. Corp. v. Savannah Teachers Props., 263 Ga. App. 513, 588 S.E.2d 310 (2003); Levenson v. Word, 294 Ga. App. 104, 668 S.E.2d 763 (2008).

23-1-2. Scope of equity jurisdiction; modes of remedy.

Generally, equity jurisprudence embraces the same matters of jurisdiction and modes of remedy as were allowed and practiced in England.

History. — Orig. Code 1863, § 3033; Code 1868, § 3045; Code 1873, § 3100; Code 1882, § 3100; Civil Code 1895, § 3945; Civil Code 1910, § 4542; Code 1933, § 37-124.

JUDICIAL DECISIONS

In England, as well as in most of the states, the rule that equity acts upon the person of the defendant is held to prevail, in the absence of statutory modification; so that it remains the general rule that jurisdiction in rem or quasi in rem, in equity, just as at law, is the creature of statutes, which are to be strictly construed. Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937).

Cited in Voyles v. Federal Land Bank, 182 Ga. 569, 186 S.E. 405 (1936); Jackson v. Massachusetts Mut. Life Ins. Co., 183 Ga. 659, 189 S.E. 243 (1936); Rockefeller v. First Nat'l Bank, 213 Ga. 493, 100 S.E.2d 279 (1957).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 6, 118.

23-1-3. Grounds for equity jurisdiction.

Equity jurisdiction is established and allowed for the protection and relief of parties where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong or relieving for injuries done.

History. — Orig. Code 1863, § 3014; Code 1868, § 3026; Code 1873, § 3081; Code 1882, § 3081; Civil Code 1895, § 3922; Civil Code 1910, § 4519; Code 1933, § 37-102.

JUDICIAL DECISIONS

Universal test of the jurisdiction of a court to issue injunctions is the absence of a legal remedy by which the complainant might obtain the full relief to which the facts and circumstances entitle the complainant, and this is likewise the test of its power to restrain breaches of a contract. Ford v. Finney, 35 Ga. 258 (1866); Chadwick v. Dolinoff, 207 Ga. 702, 64 S.E.2d 76 (1951).

Equity will grant relief only when there is no available and adequate and complete remedy at law. Colston v. Hutchinson, 208 Ga. 559, 67 S.E.2d 763 (1951); Cantrell v. Henry County, 250 Ga. 822, 301 S.E.2d 870 (1983).

In a breach of contract action between an insurer and an agency, the trial court did not abuse the court's discretion in granting an interlocutory injunction to the agency as, after a balancing of the equities in the agency's favor, the record supported the finding that the insurer conducted itself, to the agency's detriment, as though arbitration of the dispute had been completed and it had been absolved from complying with its post-termination obligations under the underlying agency agreement between the parties. Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., 290 Ga. App. 660, 660 S.E.2d 445 (2008), cert. denied, No. S08C1321, 2008 Ga. LEXIS 687 (Ga. 2008).

When all relief sought can be obtained in the manner provided for by law, it is error for equity to intervene. Waller v. Conner, 218 Ga. 633, 129 S.E.2d 845 (1963); Thomason v. Harper Motor Lines, 225 Ga. 312, 168 S.E.2d 147 (1969).

Equity by writ of injunction will restrain any act which is illegal or contrary to equity and good conscience and for which no adequate remedy at law is provided. But when all the relief sought can be obtained in the manner provided by law, a suit in equity for injunction will not lie. Lanier v. Suttles, 212 Ga. 154, 91 S.E.2d 21 (1956).

Injunction does not lie when the complaining party has a plain and adequate remedy at law which is practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Thomason v. Harper Motor Lines, 225 Ga. 312, 168 S.E.2d 147 (1969).

Since equity jurisdiction is for the relief of parties when the general rules of law would be deficient in protecting from anticipated wrong or affording relief for injuries done, there is no sound reason in law or equity why equity should not take jurisdiction and grant relief from a void marriage complained of that will be both adequate and complete. Gearllach v. Odom, 200 Ga. 350, 37 S.E.2d 184 (1946).

When no legal reason appears from the allegations of the petition why the plaintiff, without seeking an injunction, is not possessed of an adequate and complete remedy at law; in the absence of such indispensable averments, the petition fails to state a proper cause for the extraordinary equitable remedy of injunction. Chadwick v. Dolinoff, 207 Ga. 702, 64 S.E.2d 76 (1951).

Equitable relief is inappropriate when an adequate and complete remedy at law in the form of an action in implied assumpsit or quasi-contract was and is available against a party, the record and the order of the trial court suggest that a

money judgment against the party would provide complete relief with respect to the party, and the record fails to disclose affirmatively that such a remedy would not be adequate. Cantrell v. Henry County, 250 Ga. 822, 301 S.E.2d 870 (1983).

When a statutory remedy by appeal has failed to eliminate the law violation or gross abuse of discretion which is its equivalent, equity will grant relief. Carter v. Board of Educ., 221 Ga. 775, 147 S.E.2d 315 (1966).

When, upon the death of the grantee in a deed executed by a married woman, a receiver is appointed for the property belonging to his estate, and the grantor in such a deed intervenes in the equitable proceeding for the purpose of asserting her right to recover the property so conveyed to the decedent, and mesne profits thereon, upon the ground that the conveyance was made in satisfaction of the debt of her husband, the proceeding is one in equity and is governed by equitable principles. In such a case the intervenor cannot recover against the assets in the hands of the receiver for administration in equity, without accounting for such portion of the consideration for her deed as was represented by her own obligation. Turner v. Warren, 193 Ga. 455, 18 S.E.2d 865 (1942).

Courts exercising equitable jurisdiction will not enjoin prosecutions under municipal ordinances, even when the ordinances are allegedly invalid and there are threats of arrest and multiplicity of prosecutions, unless it is shown that the threatened prosecutions are for the sole purpose of unlawfully taking or destroying property or the business of the plaintiff, or that they will in fact result in irreparable injury thereto, and unless the complaining party has no plain and adequate remedy at law which is as practical and efficient to the ends of justice and its prompt administration as its remedy in equity. Arnold v. Mathews, 226 Ga. 809, 177 S.E.2d 691 (1970).

Statement that decisions of the boards of education will not be interfered with by courts of equity unless they amount to a violation of law or are a gross abuse of discretion must be read and considered along with the rule of law that remedies at law, if adequate, must be exhausted before resort to equity will be allowed; when thus construed they mean simply that, when the remedy by appeal has failed to eliminate the law violation or gross abuse of discretion which is its equivalent, equity will grant relief or, as is permissible in all cases to prevent irreparable injury, or when equity alone can grant adequate relief, exhaustion of the statutory remedy of appeal is not a prerequisite to relief in equity. Bedingfield v. Parkerson, 212 Ga. 654, 94 S.E.2d 714 (1956).

When it is necessary to prevent irreparable injury or when equity alone can grant adequate relief, exhaustion of a statutory remedy of appeal is not a prerequisite to relief in equity. Carter v. Board of Educ., 221 Ga. 775, 147 S.E.2d 315 (1966).

A court of equity should not exercise the court's extraordinary powers when there is no grave danger of impending injury; bare fears of injury will not authorize such action. McPhaul v. Simon, 181 Ga. 260, 182 S.E. 19 (1935).

Fact that repeated arrests and prosecutions may be instituted under an invalid ordinance will not, without more, justify equitable interference. Jewel Tea Co. v. City of Cartersville, 185 Ga. 799, 196 S.E. 712 (1938).

The fact that a prosecution may be based on an invalid ordinance does not, in the absence of other circumstances, justify intervention of equity changing the general rule. Spur Distrib. Co. v. Mayor of Americus, 190 Ga. 842, 11 S.E.2d 30 (1940).

Mere inconvenience and expense and apprehension of injury to property rights will not give equity jurisdiction; neither will mere general allegations of irreparable injury and deprivation of property rights. Spur Distrib. Co. v. Mayor of Americus, 190 Ga. 842, 11 S.E.2d 30 (1940).

Mere financial inability to furnish the bond required affords no lawful basis for equitable interference. Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937).

As a general rule, equity will not decree specific performance of contracts relating to personal property.

Black v. American Vending Co., 239 Ga. 632, 238 S.E.2d 420 (1977).

Only under exceptional facts and circumstances may equity powers be used to restrain criminal prosecutions, even though their defense may be burdensome and attended by inconvenience. Spur Distrib. Co. v. Mayor of Americus, 190 Ga. 842, 11 S.E.2d 30 (1940).

When a petitioner seeking an equitable decree annulling a bigamous marriage asserts that he did not know at the time of the ceremony that the defendant was a married woman; he does not come into court with unclean hands barring him from equitable relief. Gearllach v. Odom, 200 Ga. 350, 37 S.E.2d 184 (1946).

Although it is uncertain that there can be a successfully-maintained proceeding in equity to annul a marriage that, as a matter of law, is null and void already, the designation of the petition as one for annulment is no reason why a decree as prayed, declaring the marriage void, should not be granted, since such a decree is essential to the full protection of the petitioner from injury that is and well may be anticipated as a result of a void marriage ceremony. Gearllach v. Odom, 200 Ga. 350, 37 S.E.2d 184 (1946).

Minor children may bring wrongful death action. — After a surviving spouse abandoned the minor children and could not be found, the factual circumstances demand the exercise of the court's equitable powers to preserve the rights of the minor children. The trial court should have allowed these minors, who have no remedy at law, to maintain an action for the wrongful death of their mother. Brown v. Liberty Oil & Ref. Corp., 261 Ga. 214, 403 S.E.2d 806 (1991).

When equity will enjoin foreclosure. — When one borrows a sum of money and executes a deed to an undivided interest in certain realty to secure the repayment of the loan, the lender has a right to foreclose upon and sell the undivided interest; and a court of equity will not, unless under peculiar circumstances, enjoin one against enforcement of the security deed, so as to allow the debtor time to have the property partitioned. Ward v. Gerdine, 183 Ga. 722, 189 S.E. 588 (1937).

Application of O.C.G.A. § 23-1-3 to the successor liability doctrine. — Corporate debtor that declared Chapter 11 bankruptcy was not liable to an LLC for unpaid rent that was owed by a lock and key company, even though the same individual owned both companies and the debtor had accepted collateral the lock and key company owned in full satisfaction of debt the company owed. The debtor's decision to accept collateral the lock and key company owned in full satisfaction of the company's debt was permitted under O.C.G.A. § 11-9-620 and was not a fraudulent attempt to avoid liabilities the lock and key company owed, the debtor was not a "mere continuation" of the lock and key company, and a contrary conclusion would have elevated form over substance and abridged the equitable principles that were codified in O.C.G.A. § 23-1-3. Acme Sec., Inc. v. CLN Props., LLC (In re Acme Sec., Inc.), 484 B.R. 475 (Bankr. N.D. Ga. 2012).

Restraint of criminal prosecution. — Allegations of petition by filling station operators asking protection from the effect of a city ordinance requiring payment by certain operators for a business license, in addition to the regular business license required of all gasoline filling stations, when the city marshal had made and was threatening to make cases against the petitioners for violation of the ordinance, the city was threatening to issue executions against plaintiff's property for the penalties in the ordinance, and there was no charter provision for the filing of affidavits of illegality, did not make out such a case as would take it out of the general rule that equitable powers may not be used to restrain criminal prosecution in enforcement of a municipal ordinance alleged to be invalid. Spur Distrib. Co. v. Mayor of Americus, 190 Ga. 842, 11 S.E.2d 30 (1940).

Courts of equity in this state are without authority to review decisions of football referees because those decisions do not present judicial controversies. Georgia High Sch. Ass'n v. Waddell, 248 Ga. 542, 285 S.E.2d 7 (1981).

Bond was adequate remedy at law for subcontractor on school project. — When a subcontractor on a school district's high school project had a remedy against the general contractor on the general contractor's performance bond under O.C.G.A. § 36-91-90, this legal remedy was adequate and precluded the subcontractor from asserting an equitable lien against the school district. McArthur Elec., Inc. v. Cobb County Sch. Dist., 281 Ga. 773, 642 S.E.2d 830 (2007).

Adequate remedy at law. — Superior court erred in granting an aunt and uncle custody of minor children because the court lacked subject matter jurisdiction to consider the petition for custody since a probate court had exclusive jurisdiction to issue and revoke letters of testamentary guardianship, and O.C.G.A. § 29-2-4(b) mandated the issuance of letters of testamentary guardianship to the brother of the children's father without notice and a hearing and without consideration of the children's best interests; equity afforded no valid basis for the superior court's exercise of jurisdiction because the aunt and uncle had an appropriate remedy in the probate court to challenge the testamentary guardianship: a petition for revocation or suspension of the brother's letters of testamentary guardianship. Zinkhan v. Bruce, 305 Ga. App. 510, 699 S.E.2d 833 (2010).

Court found no adequate remedy at law. — When an attorney-in-fact sought to enjoin the attorney-in-fact's siblings from enforcing a revocation of their parent's durable health care power of attorney, the attorney-in-fact did not have an adequate remedy at law through appointing an emergency guardian. Under O.C.G.A. § 29-4-14(b)(6), a petition for such an appointment had to set forth that no other person appeared to have authority to act, whereas the attorney-in-fact's position was that the attorney-in-fact did have the authority to act. Luther v. Luther, 289 Ga. App. 428, 657 S.E.2d 574 (2008), cert. denied, No. S08C0912, 2008 Ga. LEXIS 520 (Ga. 2008).

Specific performance properly applied. — Specific performance was the proper remedy since there was no adequate remedy at law given the nature of the stock in the small, family-owned business, and the explicit acknowledgment in the shareholders' buy-sell agreement that specific performance was the appropriate remedy in the event of a breach. Moreover, given the failure of all parties to strictly follow the terms of either the agreement or bylaws, an equitable remedy considered that done which ought to be done. Wallace v. Wallace, 345 Ga. App. 764, 813 S.E.2d 428 (2018), cert. denied, No. S18C1329, 2019 Ga. LEXIS 42, cert. denied, No. S18C1332, 2019 Ga. LEXIS 48 (Ga. 2019), cert. denied, 2019 U.S. LEXIS 6165, 205 L. Ed. 2d 30 (U.S. 2019).

Equity improperly invoked in custody cases. — Trial court erred by invoking equity as a basis to grant custody of the twins to their biological mother because when the mother surrendered her parental rights to the twins the mother forfeited the mother's custody rights to them, when the adoptive father adopted them the father gained the right to their custody, and the mother was not included within O.C.G.A. § 19-7-1(b.1)'s list of third parties permitted to seek custody against a parent when the mother filed her custody petition. Oni v. Oni, 351 Ga. App. 400, 830 S.E.2d 775 (2019), cert. denied, No. S19C1608, 2020 Ga. LEXIS 158 (Ga. 2020).

Cited in Edwards Mfg. Co. v. Hood, 167 Ga. 144, 145 S.E. 87 (1928); Harper v. Durden, 177 Ga. 216, 170 S.E. 45 (1933); Aetna Ins. Co. v. Lunsford, 179 Ga. 716, 177 S.E. 727 (1934); Sutton v. Adams, 180 Ga. 48, 178 S.E. 365 (1934); Biddle v. Papa, 180 Ga. 468, 179 S.E. 357 (1935); Lewis v. Board of Educ., 183 Ga. 687, 189 S.E. 233 (1936); Manning v. Wills, 193 Ga. 82, 17 S.E.2d 261 (1941); Cummings v. Robinson, 194 Ga. 336, 21 S.E.2d 627 (1942); Hamrick v. Hamrick, 206 Ga. 564, 58 S.E.2d 145 (1950); Coffey v. City of Marietta, 212 Ga. 189, 91 S.E.2d 482 (1956); Hortman v. Yarbrough, 214 Ga. 693, 107 S.E.2d 202 (1959); Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); Burch v. Williams, 226 Ga. 10, 172 S.E.2d 417 (1970); Hughes v. Albert, 238 Ga. 721, 235 S.E.2d 34 (1977); Pembroke State Bank v. Balboa Ins. Co., 144 Ga. App. 609, 241 S.E.2d 483 (1978); Cawthon v. Douglas County, 248 Ga. 760, 286 S.E.2d 30 (1982);

Brown v. Brown, 265 Ga. 725, 462 S.E.2d 609 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 19 et seq., 87.

C.J.S. — 30 C.J.S., Equity, § 19 et seq.

ALR. — Right of victim of practical joke to recover against its perpetrator, 9 A.L.R. 364.

Jurisdiction of equity to protect personal rights, 14 A.L.R. 295.

Constitutionality of statute conferring on chancery courts power to abate public nuisance, 22 A.L.R. 542; 75 A.L.R. 1298.

Power of equity in absence of statute to render deficiency judgment in foreclosure action, 34 A.L.R. 1015.

Relief of purchaser against forfeiture of land contract, 40 A.L.R. 182.

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Validity and enforceability of restrictive covenants in contracts of employment, 52 A.L.R. 1362; 67 A.L.R. 1002; 98 A.L.R. 963.

Inherent power of equity, at instance of a stockholder, to appoint receiver for, or to wind up, a solvent, going corporation, on ground of fraud, mismanagement, or dissensions, 61 A.L.R. 1212; 91 A.L.R. 665.

Relief in equity from mistake of law, 75 A.L.R. 896.

Power of equity to enjoin prosecution of independent actions at law by different persons injured by the same tort, 75 A.L.R. 1444.

Jurisdiction of equity on the ground of avoiding multiplicity of actions at law of suit to enforce statutory liability of stockholders or to enjoin actions at law in that regard, 94 A.L.R. 1372.

Jurisdiction of equity courts in the United States, without the aid of statute expressly conferring it, to entertain independent suit for alimony or separate maintenance without divorce or judicial separation, 141 A.L.R. 399.

Right of lessee to equitable relief against forfeiture for breach of conditions as affected by lessor's giving a lease to or entering into other contractual obligations with a third person, 166 A.L.R. 807.

Remedy at law available to beneficiary of trust as exclusive of remedy in equity, 171 A.L.R. 429.

Injunction as remedy for breach of contract to employ plaintiff or give exclusive right to promote or sell defendant's product or invention, 173 A.L.R. 1198.

Jurisdiction of equity to protect personal rights; modern view, 175 A.L.R. 438.

Doctrine of constructive trust or unjust enrichment as applicable between owner and one who fraudulently procures tax certificates, 175 A.L.R. 700.

Purchaser's misrepresentations as to intended use of real property as ground for vendor's equitable relief from contract and deed, 35 A.L.R.3d 1369.

Construction and operation of parking-space provision in shopping-center lease, 56 A.L.R.3d 596.

Right of contingent remainderman to maintain action for damages for waste, 56 A.L.R.3d 677.

23-1-4. Effect of legal remedy on exercise of jurisdiction.

Equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law; but the mere privilege of a party to bring an action at law or the existence of a common-law remedy not as complete or effectual as the equitable relief shall not deprive equity of jurisdiction.

History. — Orig. Code 1863, § 3028; Code 1868, § 3040; Code 1873, § 3095; Code 1882, § 3095; Civil Code 1895, § 3941; Civil Code 1910, § 4538; Code

1933, § 37-120.

JUDICIAL DECISIONS

It will be readily seen from this section that, if the law itself provides a full and adequate remedy, ordinarily that is the end of the matter, and equity will not interfere. Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937).

Equity grants no relief to one who has an adequate remedy at law. Goodman v. Georgia R.R. Bank & Trust Co., 221 Ga. 396, 144 S.E.2d 764 (1965).

When private property is actually about to be confiscated by the enforcement of an assessment for a local improvement, the remedy of affidavit of illegality as provided in the city charter is not as complete or effectual as equitable relief; in such a case an injunction may be granted. Holst v. City of La Grange, 175 Ga. 402, 165 S.E. 217 (1932).

A mere privilege to a party to sue at law, or the existence of a common-law remedy not as complete or effectual as the equitable relief, does not deprive equity of jurisdiction. Quitman Cooperage Co. v. People's First Nat'l Bank, 178 Ga. 90, 172 S.E. 17 (1933).

A money judgment having been rendered in a trover suit pending bankruptcy proceedings voluntarily instituted by the defendant therein, the petition brought by the defendant to enjoin garnishment proceedings based on the trover judgment on the ground that the debt had been subsequently discharged by the order of the bankruptcy court, should have been dismissed on general demurrer (now motion to dismiss); because, if the debt was discharged, the defendant could have been fully protected by setting up this defense in the court where the garnishment case was pending and where he had an adequate and complete remedy at law, in which event a court of equity will not grant relief; and because a judgment for the plaintiff in an action of trover, although rendered for a sum of money and not for the property in controversy, constitutes an adjudication of the plaintiff's title to the property, and the debt thus created is not dischargeable in bankruptcy. Nash Loan Co. v. Yonge, 182 Ga. 672, 186 S.E. 811 (1936).

When a defendant has been served and a judgment is rendered against the defendant by fraud, accident, or mistake, without fault or negligence on the defendant's part, a petition in equity to set aside the judgment will lie. Dollar v. Fred W. Amend Co., 184 Ga. 432, 191 S.E.2d 696 (1937).

If for any special reason the remedy by attachment against a nonresident debtor in an ordinary claim ex contractu or ex delicto is unavailable or inadequate, equity will lend its aid; but, when in such an ordinary claim the remedy by attachment is available and affords adequate relief, and when the facts alleged fail to invoke any other recognized principle authorizing equitable relief, a court of equity will refuse to assume jurisdiction. Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937).

Petition to have defendant enjoined from interfering with plaintiffs in possession of disputed part of land, possession and control of which was alleged to be in defendant, showed no ground for equitable relief, and the existence of an adequate remedy at law because a court of equity will not ordinarily entertain a bill solely for the purpose of establishing the title of a party to real estate, or for the recovery of possession thereof, as these objects can generally be accomplished by an action of ejectment at law. Slaughter v. Land, 190 Ga. 491, 9 S.E.2d 754 (1940).

When the plaintiff contends all partnership relations between the plaintiff and the defendant have come to an end, that a balance has been struck, and that an indebtedness is allegedly due by the defendant to the plaintiff, which cannot be affected by any transactions between the partnership and its creditors or debtors, this is not an equitable action by a member of a firm against one's copartner, but an action of law, one man against another who has formerly been one's partner, upon an indebtedness a part of which grew out of the formerly existing partnership be-

tween them. Manry v. Hendricks, 192 Ga. 319, 15 S.E.2d 434 (1941).

When the partnership has been fully dissolved by written contract and the rights of each party definitely established, in case of a breach of such contract equity will not order an accounting as the remedy is at law. Manry v. Hendricks, 192 Ga. 319, 15 S.E.2d 434 (1941).

Even if in any case equity can remove an executor, when there were no allegations in petition seeking inter alia removal of an executor for fraud and conspiracy tending to show why complainants could not by pursuing the remedy provided by law before the court of ordinary (now probate court), obtain relief as complete and effectual as in a court of equity, under the principle codified in this section, equity would not assume jurisdiction. Georgia Baptist Orphans Home v. Weaver, 193 Ga. 669, 19 S.E.2d 272 (1942).

When plaintiff alleges that the plaintiff provided certain labor and materials used in the construction of an apartment house under a contract with the subcontractor of the general contractor, for which the plaintiff has not been paid, and alleges no reason why the plaintiff's remedy at law, suit on the contract, would not be adequate, full, and complete, nor does the plaintiff allege that the subcontractor is insolvent or unable in any way to respond in damages, or is a nonresident of the state, the trial court did not err in sustaining the general demurrer (now motion to dismiss). Maggi v. Sylvan Circle Apts., Inc., 207 Ga. 580, 63 S.E.2d 368 (1951).

When the petitioner sought to have an ordinance declared void, and the prosecutions enjoined, and by an amendment to the charter disputed tax executions may be contested by affidavit of illegality, this adequate and complete remedy at law to contest the validity of the ordinance being available, the intervention of equity would not be authorized. City of Eatonton v. Peck, 207 Ga. 705, 64 S.E.2d 61 (1951).

A bare threat of injury to property, which, if followed up by an overt act would work irreparable injury, affords no basis for equitable relief by injunction or otherwise. Nottingham v. Elliott, 209 Ga. 481, 74 S.E.2d 93 (1953).

Equity grants no relief to one who has an adequate and complete remedy at law for the redress of an actionable wrong. Mayor of Carrollton v. Chambers, 215 Ga. 193, 109 S.E.2d 755 (1959).

Since the plaintiff had an adequate and complete remedy at law by affidavit of illegality, an affidavit of illegality, and not a petition for injunction, was the procedure which the plaintiff should have employed to test the validity of property tax assessments. Mayor of Carrollton v. Chambers, 215 Ga. 193, 109 S.E.2d 755 (1959).

Insolvency of a subcontractor and inability to respond to such damages as the contractor might recover for breach of the contract is ground for equitable intervention. By bringing in the surety whose principal was insolvent the contractor would be able to obtain full relief, but the contractor's legal remedy would not be complete or as effective and efficient to the ends of justice as that which could be afforded by a court of equity. Concrete Coring Contractors v. Mechanical Contractors & Eng'rs, 220 Ga. 714, 141 S.E.2d 439 (1965).

In the absence of statutory authority, equity will not intervene when a party has a complete and adequate remedy at law and no other equitable reasons, such as avoidance of a multiplicity of suits or that the acts of the defendant complained of constitute a constantly recurring wrong, generally denominated a continuing wrong, are alleged. Womble v. State Bd. of Exmrs., 221 Ga. 457, 145 S.E.2d 485 (1965).

When an adequate remedy at law exists, equity is without jurisdiction of the case. Y. v. S., 224 Ga. 352, 162 S.E.2d 321 (1968).

Equitable relief is improper if the complainant has a remedy at law which is "adequate," i.e., as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. Sherrer v. Hale, 248 Ga. 793, 285 S.E.2d 714 (1982).

Equity will grant relief only when there is no available adequate and complete remedy at law. Cantrell v. Henry County, 250 Ga. 822, 301 S.E.2d 870 (1983).

Equitable relief is inappropriate when

an adequate and complete remedy at law in the form of an action in implied assumpsit or quasi-contract was and is available against a party, the record and the order of the trial court suggest that a money judgment against the party would provide complete relief with respect to that party, and the record fails to disclose affirmatively that such a remedy would not be adequate. Cantrell v. Henry County, 250 Ga. 822, 301 S.E.2d 870 (1983).

When subsequent to the court's order of payment of a sum of money into the court registry, the jury awarded a judgment in that amount to the plaintiff, as the plaintiff had an adequate remedy at law, the equitable relief granted by the trial court was inappropriate. Prosser v. Hancock Bus Sales, Inc., 256 Ga. 399, 349 S.E.2d 460 (1986).

In a breach of contract action between an insurer and an agency, the trial court did not abuse the court's discretion in granting an interlocutory injunction to the agency as, after a balancing of the equities in the agency's favor, the record supported the finding that the insurer conducted itself, to the agency's detriment, as though arbitration of the dispute had been completed and it had been absolved from complying with its post-termination obligations under the underlying agency agreement between the parties. Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., 290 Ga. App. 660, 660 S.E.2d 445 (2008), cert. denied, No. S08C1321, 2008 Ga. LEXIS 687 (Ga. 2008).

Injunction requiring a bank to pay certain funds into a trial court's registry was inappropriate because a lender had an adequate remedy at law since it could obtain a judgment to completely compensate it for any loss from the bank's removal of funds from a debtor's account. Century Bank of Ga. v. Bank of Am., N.A., 286 Ga. 72, 685 S.E.2d 82 (2009).

An employer whose employee had opened a competing business and taken the employer's trade secrets and confidential information had an adequate and complete remedy at law because it could recover money damages from the employee if the employee removed funds from the employee's competing business that rightfully belonged to the employer. Therefore, under O.C.G.A. §§ 9-5-6 and 23-1-4, a trial court erred in requiring the employee to deposit the business's funds into the registry of the court. Coleman v. Retina Consultants, P.C., 286 Ga. 317, 687 S.E.2d 457 (2009).

Mere apprehension of danger, unless founded upon reason, will not require equitable relief. Maggi v. Sylvan Circle Apts., Inc., 207 Ga. 580, 63 S.E.2d 368 (1951).

Mere financial inability to furnish the bond required affords no lawful basis for equitable interference. Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937).

A mere verbal claim to, or assertion of ownership in, property is not such a cloud upon the title of the owner as can be removed by equitable proceedings. Nottingham v. Elliott, 209 Ga. 481, 74 S.E.2d 93 (1953).

A remedy at law, to exclude appropriate relief in equity, must be complete and the substantial equivalent of the equitable relief. — It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. Davis v. Logan, 206 Ga. 524, 57 S.E.2d 568 (1950).

In a case arising from a mortgage fraud scheme, the government unsuccessfully argued that a title insurance company was not entitled to a constructive trust because it had an adequate remedy at law based on the Attorney General's authority, pursuant to 21 U.S.C. § 853(i)(1), to remit a forfeiture in the interest of justice. Not only was the § 853(i)(1) remission a non-judicial remedy left entirely to the discretion of the Attorney General, but under O.C.G.A. § 23-1-4, equitable remedies, such as constructive trusts, were not precluded by the existence of an alternate remedy that was not as complete or effectual as the equitable relief. United States v. Shefton, 548 F.3d 1360 (11th Cir. 2008).

An unconstitutional or void statutory provision will not furnish an adequate remedy at law. Stinson v. Manning, 221 Ga. 487, 145 S.E.2d 541 (1965).

When it is necessary to prevent irreparable injury or when equity alone can grant adequate relief, exhaustion of a statutory remedy of appeal is not a prerequisite to relief in equity. Carter v. Board of Educ., 221 Ga. 775, 147 S.E.2d 315 (1966).

When a statutory remedy by appeal has failed to eliminate the law violation or gross abuse of discretion which is its equivalent, equity will grant relief. Carter v. Board of Educ., 221 Ga. 775, 147 S.E.2d 315 (1966).

Property owners dissatisfied with the act of a building inspector in issuing a permit to erect a church have the right to appeal from the order of the building inspector to the board of adjustment. Ledbetter v. Callaway, 211 Ga. 607, 87 S.E.2d 317 (1955).

As a general rule, equity will not decree specific performance of contracts relating to personal property. Black v. American Vending Co., 239 Ga. 632, 238 S.E.2d 420 (1977).

A court of equity will not ordinarily entertain a bill solely for the purpose of establishing title of a party to real estate, or for the recovery of possession thereof, as these objects can generally be accomplished by an action of ejectment of law. Collier v. Garner, 177 Ga. 467, 170 S.E. 353 (1933); Nottingham v. Elliott, 209 Ga. 481, 74 S.E.2d 93 (1953).

Except in a case specially provided for by statute, equity will not interfere to restrain a trespass, unless the injury is irreparable in damages, or the trespasser is insolvent, or there exist other circumstances which, in the discretion of the court, render the interposition of this writ necessary and proper. Collier v. Garner, 177 Ga. 467, 170 S.E. 353 (1933); Nottingham v. Elliott, 209 Ga. 481, 74 S.E.2d 93 (1953).

When a petition does not allege facts showing irreparable damages nor any trespass by the defendant upon any lands claimed by the petitioner, nor that the defendant is insolvent, and does not show why a court of equity should take jurisdiction in order to avoid multiplicity of action, the petition failed to state a cause of action for any equitable relief. Shobkov v. Pennington, 217 Ga. 315, 122 S.E.2d 87 (1961).

Rezoning must be sought before constitutionality of ordinance considered. — Before litigants seek declaration by court of equity that zoning ordinance is unconstitutional as applied to their property, they must apply to the local authorities for relief by rezoning. Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981).

Time limit on filing suit challenging zoning ordinance. — Not only is application for rezoning a prerequisite to filing suit in equity seeking declaration that zoning ordinance is unconstitutional, but, after application for rezoning is denied by governing authority, any suit in equity attacking zoning ordinance as applied to property involved is time barred when no suit challenging zoning classification is filed within 30 days of that decision. Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981).

Restrictive covenant cases. — An injunction will lie in restrictive covenant cases by employers against former employees even when damages are also sought. National Settlement Assocs. v. Creel, 256 Ga. 329, 349 S.E.2d 177 (1986).

Bond was adequate remedy at law for subcontractor on school project. — When a subcontractor on a school district's high school project had a remedy against the general contractor on the general contractor's performance bond under O.C.G.A. § 36-91-90, this legal remedy was adequate and precluded the subcontractor from asserting an equitable lien against the school district. McArthur Elec., Inc. v. Cobb County Sch. Dist., 281 Ga. 773, 642 S.E.2d 830 (2007).

Cited in Bowden v. Georgia Pub. Serv. Comm'n, 170 Ga. 505, 153 S.E. 42 (1930); American Sec. Co. v. Miller, 173 Ga. 82, 159 S.E. 692 (1931); Reid v. Gordon, 173 Ga. 168, 159 S.E. 708 (1931); Sutton v. Adams, 180 Ga. 48, 178 S.E. 365 (1934); Gavant v. Berger, 180 Ga. 753, 180 S.E. 613 (1935); Jackson v. Becker Roofing Co., 180 Ga. 769, 180 S.E. 822 (1935); Pendley v. Tumlin, 181 Ga. 808, 184 S.E. 283 (1936); Hodges v. State Revenue Comm'n, 183 Ga. 832, 190 S.E. 36 (1937); Wallace v. Stovall, 189 Ga. 195, 5 S.E.2d 635 (1939); Bibb County v. Winslett, 191 Ga. 860, 14 S.E.2d 108 (1941); McCord v. Walton, 192

Ga. 279, 14 S.E.2d 723 (1941); Matson v. Crowe, 193 Ga. 578, 19 S.E.2d 288 (1942); Stephens v. City Council, 193 Ga. 815, 20 S.E.2d 80 (1942); Cummings v. Robinson, 194 Ga. 336, 21 S.E.2d 627 (1942); Robinson v. Murray, 198 Ga. 690, 32 S.E.2d 496 (1944); Dwyer v. Jones, 201 Ga. 259, 39 S.E.2d 313 (1946); Fulmer v. Wilkins, 201 Ga. 322, 39 S.E.2d 405 (1946); Haney v. Sheppard, 207 Ga. 158, 60 S.E.2d 453 (1950); Ware v. Martin, 207 Ga. 512, 63 S.E.2d 335 (1951); Scarbrough v. Cook, 208 Ga. 697, 69 S.E.2d 201 (1952); Williamon v. Williamon, 209 Ga. 494, 74 S.E.2d 71 (1953); Boatright v. Yates, 211 Ga. 125, 84 S.E.2d 195 (1954); Patterson v. Boyd, 211 Ga. 679, 87 S.E.2d 861 (1955); Winn v. Morton, 212 Ga. 282, 92 S.E.2d 97 (1956); Hortman v. Yarbrough, 214 Ga. 693, 107 S.E.2d 202 (1959); Ramsey v. Womack, 214 Ga. 722, 107 S.E.2d 180 (1959); Ellis v. City of Atlanta, 214 Ga. 811, 108 S.E.2d 269 (1959); Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); K. Gordon Murray Prods., Inc. v. Floyd, 217 Ga. 784, 125 S.E.2d 207 (1962); Stein Steel & Supply Co. v. Briggs Mfg. Co., 219 Ga. 779, 135 S.E.2d 862 (1962); Murdock v. Perkins, 219 Ga. 756, 135 S.E.2d 869 (1964); Clements v. Elder, 221 Ga. 438, 145 S.E.2d 246 (1965); Parker v. Davidson, 223 Ga. 672, 157 S.E.2d 489 (1967); Burch v. Williams, 226 Ga. 10, 172 S.E.2d 417 (1970); Jonesboro Area Athletic Ass'n v. Dickson, 227 Ga. 513, 181 S.E.2d 852 (1971); Burnham v. Lynn, 235 Ga. 207, 219 S.E.2d 111 (1975); Allsouth Sprinkler Co. v. Network Bldg. Sys., 238 Ga. 372, 233 S.E.2d 174 (1977); City of Atlanta v. Wolcott, 240 Ga. 244, 240 S.E.2d 83 (1977); Liniado v. Alexander, 199 Ga. App. 256, 404 S.E.2d 602 (1991); Mayor & Council v. Hall, 261 Ga. 681, 410 S.E.2d 105 (1991); Powell v. City of Snellville, 266 Ga. 315, 467 S.E.2d 540 (1996); City of Duluth v. Riverbrooke Properties, Inc., 233 Ga. App. 46, 502 S.E.2d 806 (1998); McBride v. Life Ins. Co., 190 F. Supp. 2d 1366 (M.D. Ga. 2002); Paine v. Nations, 301 Ga. App. 97, 686 S.E.2d 876 (2009); Sanders v. Riley, 296 Ga. 693, 770 S.E.2d 570 (2015).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 10, 89.

C.J.S. — 30 C.J.S., Equity, § 89.

ALR. — Constitutionality of statute conferring on chancery courts power to abate public nuisance, 22 A.L.R. 542; 75 A.L.R. 1298.

Injunction against exercise of power of eminent domain, 93 A.L.R.2d 465.

23-1-5. Concurrent jurisdiction of law and equity.

Where law and equity have concurrent jurisdiction, whichever first takes jurisdiction shall retain it, unless a good reason shall be given for the interference of equity.

History. — Orig. Code 1863, § 3029; Code 1868, § 3041; Code 1873, § 3096; Code 1882, § 3096; Civil Code 1895, § 3943; Civil Code 1910, § 4540; Code 1933, § 37-122.

JUDICIAL DECISIONS

When law and equity have concurrent jurisdiction, the court first taking will retain it, unless a good reason can be given for the interference of equity. Duke v. Duke, 181 Ga. 21, 181 S.E. 161 (1935); Robinson v. Georgia Sav. Bank & Trust Co., 185 Ga. 688, 196 S.E. 395 (1938).

A court of equity has concurrent jurisdiction with the judge of probate court over the settlement of accounts of administrators and executors; and

the court first taking jurisdiction will retain it. Terry v. Chandler, 172 Ga. 715, 158 S.E. 572 (1931).

When a habeas corpus proceeding is filed in the court of ordinary (now probate court), involving custody of a minor child, and subsequently a petition is filed involving divorce, alimony, and the custody of such child, equity has power to enjoin the habeas corpus proceeding and determine all the issues in one action. Duke v. Duke, 181 Ga. 21, 181 S.E. 161 (1935).

Since equity has concurrent jurisdiction with courts of ordinary (now probate courts) in the administration of estates, when its interference is necessary for the full protection of the rights of parties at interest and since it is a recognized rule that, when the heirs at law get together and agree to divide the estate and appoint an agent and put the agent in possession of the property for that purpose, a bill may be filed against the agent by any one or more of the distributees, the same as against an administrator, it cannot be said that, a petition seeking an order restraining the heir's agent from the alleged fraudulent acts, and a receivership under direction of the court of equity was devoid of equity. Shingler v. Shingler, 184 Ga. 671, 192 S.E. 824 (1937).

While the ordinary (now judge of probate court) and the judge of the superior court have equal and concurrent jurisdiction in determining the custody of the children of husband and wife living in a state of separation, only the superior court, so far as habeas corpus proceedings may be resorted to, has jurisdiction of such subject matter when related to a suit for divorce, and superior court judge who, after a habeas corpus proceeding before the ordinary (now judge of probate court) acquires jurisdiction of the subject matter in a divorce proceeding, may properly enjoin further progress of the former proceeding before the ordinary (now judge of probate court), in order that all questions raised by the divorce suit may be considered together. Ponder v. Ponder, 198 Ga. 781, 32 S.E.2d 801 (1945).

While the ordinary (now judge of probate court) and the judge of the superior court have equal and concurrent jurisdiction in a habeas corpus proceeding between husband and wife involving the custody of their child, it is the general rule that, when two courts have such concurrent jurisdiction over the subject matter and the parties, the court first taking jurisdiction will retain it unless some good reason be shown for equitable interference. Breeden v. Breeden, 202 Ga. 740, 44 S.E.2d 667 (1947).

When the superior court acquired jurisdiction of the question of the custody of a child in a divorce case, it retained that jurisdiction for the purpose of rendering a final judgment as to the custody of the child, and when the attempted dismissal by the wife of the proceeding was ineffectual, the ordinary (now judge of probate court) of the county, to whom the wife presented a petition for the writ of habeas corpus, was without jurisdiction to act upon the petition. Breeden v. Breeden, 202 Ga. 740, 44 S.E.2d 667 (1947).

When the court has acquired equitable jurisdiction of the parties and the cause by virtue of equitable averments and prayers, it retains jurisdiction for all related purposes as made by the pleadings. Kniepkamp v. Richards, 192 Ga. 509, 16 S.E.2d 24 (1941).

When it appears from a petition praying for an accounting that there was pending in another court a suit by the corporate defendant against the plaintiff, such court being empowered to render an accounting between the parties, and no special reason being set out why a court of equity should assume jurisdiction for such purpose, equity will not enjoin the proceedings and processes of a court of law in the absence of some intervening equity or other proper defense of which the party, without fault on the party's part, cannot avail oneself at law. Peeples v. Peeples, 193 Ga. 358, 18 S.E.2d 629 (1942).

Equity will not interfere with the regular administration of estates at the instance of an heir except when there is danger of loss or other injury to one's interest. Gill v. Gill, 211 Ga. 567, 87 S.E.2d 389 (1955).

Concurrent jurisdiction no longer existed. — Trial court had jurisdiction to enter an adoption decree that terminated the parental rights of the biological father because the juvenile court proceeding as

to the biological father's parental rights had long since ended and, therefore, there was no problem of overlapping jurisdiction or competing, inconsistent rulings. Parker v. Stone, 333 Ga. App. 638, 773 S.E.2d 793 (2015).

Concurrent jurisdiction over counterclaim for accounting of estate. — Because the plaintiffs asserted claims for conversion of property and sought a court order requiring the defendants to turn over certain items of personal property, such claims were properly heard by the superior court, as the court of equity and, accordingly, the superior court properly exercised concurrent jurisdiction over the counterclaim for accounting of an estate. Braswell v. Benton, 351 Ga. App. 372, 830 S.E.2d 758 (2019).

Cited in Davis v. Culpepper, 167 Ga. 637, 146 S.E. 319 (1929); Calbeck v. Herrington, 169 Ga. 869, 152 S.E. 53 (1930); Darby v. Green, 174 Ga. 146, 162 S.E. 493 (1932); Chase v. Bartlett, 176 Ga. 40, 166 S.E. 832 (1932); McCord v. Walton, 192 Ga. 279, 14 S.E.2d 723 (1941); Beavers v. Williams, 199 Ga. 114, 33 S.E.2d 343 (1945); Taylor v. Abbott, 201 Ga. 254, 39 S.E.2d 471 (1946); Walker Elec. Co. v. Walton, 203 Ga. 246, 46 S.E.2d 184 (1948); Hoffman v. Chester, 204 Ga. 296, 49 S.E.2d 760 (1948); Hamrick v. Hamrick, 206 Ga. 564, 58 S.E.2d 145 (1950); Clark v. White, 185 F.2d 528 (5th Cir. 1950); Rountree v. Davis, 90 Ga. App. 223, 82 S.E.2d 716 (1954); Seckinger v. Citizens & S. Nat'l Bank, 213 Ga. 586, 100 S.E.2d 587 (1957); Simpson v. American Nat'l Bank, 139 Ga. App. 112, 227 S.E.2d 903 (1976); Benefield v. Martin, 276 Ga. App. 130, 622 S.E.2d 469 (2005); Long v. Long, 303 Ga. App. 215, 692 S.E.2d 811 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 10, 88, 158.

C.J.S. — 30 C.J.S., Equity, § 21.

23-1-6. Equity follows the law.

Equity is ancillary, not antagonistic, to the law; hence, equity follows the law where the rule of law is applicable and follows the analogy of the law where no rule is directly applicable.

History. — Orig. Code 1863, § 3016; Code 1868, § 3028; Code 1873, § 3083; Code 1882, § 3083; Civil Code 1895, § 3923; Civil Code 1910, § 4520; Code 1933, § 37-103.

JUDICIAL DECISIONS

Rule that equity follows the law has become first maxim of equity. Lewis v. Board of Educ., 183 Ga. 687, 189 S.E. 233 (1936).

Equity is not antagonistic to the law, but follows the law. Irwin v. Life & Cas. Ins. Co., 204 Ga. 582, 50 S.E.2d 354 (1948).

While equity follows the law as to limitations of actions, neither laches nor the statute of limitations will run against one in peaceable possession of property under a claim of ownership for delay in resorting to the courts to establish one's rights. Crow v. Whitfield, 105 Ga. App. 436, 124 S.E.2d 648 (1962).

A court of equity will not set aside a judgment, although obtained by willful and corrupt perjury, unless it appears that the perjurer has been convicted of such perjury, and unless it appears that a judgment could not have been rendered without the perjured testimony. Hutchings v. Roquemore, 171 Ga. 359, 155 S.E. 675 (1930).

A judge could not refuse to grant an injunction to which a party was entitled under the law, unless that party would

agree to waive the incompetency declared by statute of a witness as to the particular testimony sought to be delivered by the witness as equity is not antagonistic to the law, but follows the law. Ferrell v. Wight, 187 Ga. 360, 200 S.E. 271 (1938).

Between a debtor and the debtor's judgment creditor the controlling equity lies in favor of the creditor to have satisfaction of the debtor's judgment and a court of equity will rarely, if ever, interfere with the creditor in the debtor's use of the legal means afforded the debtor for the collection of the debtor's debt. Shedden v. National Florence Crittenton Mission, 191 Ga. 428, 12 S.E.2d 618 (1940).

In a contract suit against a nonresident of Georgia who could not be served personally, praying for a temporary receiver to take charge of certain securities and hold them subject to the order of the court and for other relief when legal attachment was impossible and a court of equity intervened, the court was authorized to require a bond of the plaintiff, similar to an attachment bond. Maryland Cas. Co. v. Tow, 71 Ga. App. 178, 30 S.E.2d 433 (1944).

Since equity follows the analogy of the law, when fraud is charged, the period of limitations applicable to an action for fraud is the same as that which would apply to an action for the land, that is seven years from the discovery of the fraud. Slade v. Barber, 200 Ga. 405, 37 S.E.2d 143 (1946).

When an unmarried man procures a life insurance policy on his own life in which his mother is named beneficiary, and the policy gives the insured the right to change the beneficiary at any time, and subsequently as a consideration for marriage he agrees to substitute his wife as beneficiary in the insurance policy and tells his wife that he has made the change, but later dies without ever having attempted to have the beneficiary changed, the mother is vested with title to the proceeds of the policy upon the death of the insured, and nothing that the insurer can do thereafter can destroy or impair the mother's title thereto; and a court of equity is required, in a contest between the mother and the wife, to award the proceeds of the insurance policy to the mother. Loyd v. Loyd, 203 Ga. 775, 48 S.E.2d 365 (1948).

Equity will not give relief when to do so would violate express provisions of a statute. Lewis v. Board of Educ., 183 Ga. 687, 189 S.E. 233 (1936).

Power to levy and collect taxes is exclusively a legislative function, and unless authorized by statute, a court of equity is without power to foreclose a lien for taxes and order a sale of the property; no such power having been conferred by statute on a court of equity in this state, the court erred in decreeing that land be sold by the sheriff for payment of state and county taxes. Kirk v. Bray, 181 Ga. 814, 184 S.E. 733 (1935).

Delay alone is never enough to show laches when there is applicable statute of limitations. Clover Realty Co. v. J.L. Todd Auction Co., 240 Ga. 124, 239 S.E.2d 682 (1977).

Challenge to zoning ordinance treated as appeal or certiorari for time limit purposes. — Although suit in equity to declare zoning ordinance unconstitutional as applied to certain property is not an appeal either in form or in substance, it is nonetheless appropriate to treat it as an appeal or petition for certiorari when considering time constraints on its filing lest requirement of exhaustion be rendered wholly meaningless in that facts have completely changed since rezoning application was denied. Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981).

Cited in Lowry v. City Inv. Co., 174 Ga. 454, 163 S.E. 208 (1932); A.J. Evans Mktg. Agency, Inc. v. Federated Growers' Credit Corp., 175 Ga. 294, 165 S.E. 114 (1932); Grice v. United States Fid. & Guar. Co., 187 Ga. 259, 200 S.E. 700 (1938); Liberty Mut. Ins. Co. v. Ragan, 191 Ga. 811, 14 S.E.2d 88 (1941); Rose v. Crane Heating Co., 198 Ga. 295, 31 S.E.2d 717 (1944); Consolidated Realty Invs., Inc. v. Gasque, 203 Ga. 790, 48 S.E.2d 510 (1948); Hughes v. Griner, 208 Ga. 47, 65 S.E.2d 24 (1951); Vinson v. Citizens & S. Nat'l Bank, 208 Ga. 813, 69 S.E.2d 866 (1952); Woo v. Markwalter, 210 Ga. 156, 78 S.E.2d 473 (1953); Bair v. Willis, 218 Ga. 563, 129 S.E.2d 774 (1963); Richards v. Johnson, 219 Ga. 771, 135 S.E.2d 881 (1964); Dunn

v. Dunn, 221 Ga. 368, 144 S.E.2d 758 (1965); McDonald v. McDonald, 232 Ga. 190, 205 S.E.2d 850 (1974); Miles v. Andress, 229 Ga. App. 86, 493 S.E.2d 233 (1997); Vincent v. Longwater, 245 Ga. App. 516, 538 S.E.2d 164 (2000).

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Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 123, 124.

C.J.S. — 30 C.J.S., Equity, § 103.

ALR. — Jurisdiction of equity to protect personal rights; modern view, 175 A.L.R. 438.

23-1-7. Equity seeks to do justice.

Equity seeks always to do complete justice. Hence, having the parties before the court rightfully, it will proceed to give full relief to all parties in reference to the subject matter of the action, provided the court has jurisdiction for that purpose.

History. — Orig. Code 1863, § 3018; Code 1868, § 3030; Code 1873, § 3085; Code 1882, § 3085; Civil Code 1895, § 3925; Civil Code 1910, § 4522; Code 1933, § 37-105.

JUDICIAL DECISIONS

Maxim embodied in this section is a favorite maxim of equity. Henderson v. Lott, 163 Ga. 326, 136 S.E. 403 (1926); Roach v. Terry, 164 Ga. 421, 138 S.E. 902 (1927).

Rule that equity seeks always to do complete justice will not bring into equitable jurisdiction matters over which another court has exclusive jurisdiction. Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939).

Equity, having first acquired jurisdiction, will retain it to exclusion of all other courts, and for all other purposes. Gay v. Crockett, 217 Ga. 288, 122 S.E.2d 241 (1961).

Retention of jurisdiction. — When a court of equity obtains jurisdiction for one purpose it will retain it until full and satisfactory justice is rendered to all parties concerned. Kidd v. Finch, 188 Ga. 492, 4 S.E.2d 187 (1939).

The court of equity after taking jurisdiction for the grant of extraordinary relief will retain it for all purposes. McCord v. Walton, 192 Ga. 279, 14 S.E.2d 723 (1941).

When judge has exercised jurisdiction on the question of the sale of the property of wards for reinvestment in United States bonds, the judge has the right to retain jurisdiction for the purpose of passing upon the claim of the intervenor to a just and reasonable commission for producing the buyer of the property, thus rendering full and complete relief to all parties to the cause. Turner v. Prigmore, 202 Ga. 377, 43 S.E.2d 259 (1947).

Equity seeks to do complete justice, and to give full relief to all parties in reference to subject matter of suit, provided the court has jurisdiction for that purpose. Quitman Cooperage Co. v. People's First Nat'l Bank, 178 Ga. 90, 172 S.E. 17 (1933).

Equity seeks to do full justice but must do so within the parameters of the law; therefore, a temporary restraining order that acknowledged that students had no legal right to participate in graduation ceremony but ordered that they be allowed to do so anyway, so as to "do the right thing," was in error. Dolinger v. Driver, 269 Ga. 141, 498 S.E.2d 252 (1998).

It is one of the maxims of equity that it will not do justice by halves, and what constitutes its chief value is that it can bring before it all parties engaged in a transaction, and however diversified their interests and liabilities may be, it

can frame a decree giving each complainant one's right, and holding each defendant to one's proper accountability. Matson v. Crowe, 193 Ga. 578, 19 S.E.2d 288 (1942).

When court has acquired equitable jurisdiction, it will grant complete relief as to all matters to which parties may be entitled under the pleadings and the proof, even though such relief may include legal rights and remedies. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941).

When equity acquires jurisdiction for any purpose, it will retain jurisdiction to give full and complete relief, whether legal or equitable, as to all purposes relating to the subject matter. Kirk v. Hasty, 239 Ga. 362, 236 S.E.2d 667 (1977); Early v. Early, 243 Ga. 125, 252 S.E.2d 618 (1979).

Understanding suits in equity. — To preserve a trust estate, to supervise its management, to hold the trustee to the line of duty, for the purpose of preserving its corpus for the benefit of the beneficiaries, is an elementary branch of equity jurisprudence. The judge of the superior court of each county has power, either in term or at chambers, to remove and appoint trustees. When a court of equity obtains jurisdiction for one purpose, it will proceed to give full relief to all parties with reference to the subject matter of the suit, when the court has jurisdiction for that purpose. Fine v. Saul, 183 Ga. 309, 188 S.E. 439 (1936).

Since equity has concurrent jurisdiction with courts of ordinary (now probate courts) in the administration of estates, when the court's interference is necessary for the full protection of the rights of parties at interest and since it is a recognized rule that, when the heirs at law get together and agree to divide the estate and appoint an agent and put the agent in possession of the property for that purpose, a bill may be filed against the agent by any one or more of the distributees, the same as against an administrator, it cannot be said that a petition seeking an order restraining the heir's agent from the alleged fraudulent acts and a receivership under direction of the court of equity was devoid of equity. Shingler v. Shingler, 184 Ga. 671, 192 S.E. 824 (1937).

In an action in equity, brought against the sole heir at law of a deceased person, to reform a deed executed by a decedent and to recover possession and damages in the nature of mesne profits from a tenant of the heir at law in possession of the property, and to cancel security deeds executed by the heir at law in favor of third persons, the element of the need for reformation of the deed constitutes a common nexus in which all the parties are interested, authorizing the joinder of all interested parties; and since the other relief, both legal and equitable, prayed against the other parties respectively, for recovery of possession and damages for mesne profits and for cancellation of the security deeds, is merely such relief as is needful to make complete the justice to be done by reforming the deed, the action is not multifarious. Mims v. Lifsey, 192 Ga. 366, 15 S.E.2d 440 (1941).

When the holder of a deed from a deceased person brings an action in equity against the sole heir at law of the decedent, there being no administration of the decedent's estate, to reform the deed so as to make the description in the deed include lands held adversely by the heir at law and the tenant for years, it is proper to join also as defendants persons to whom the heir at law has executed deeds to secure debt. It is proper in an action to reform an instrument to join as defendants all who are interested adversely to the reformation. Mims v. Lifsey, 192 Ga. 366, 15 S.E.2d 440 (1941).

When the complainants under their allegations were entitled in equity to an accounting, and the amount which by the accounting they sought to establish was due them, if at all, as remainder legatees under their mother's will, the right of the executor to sell the property, the right of the petitioners to have a partition, and their right to a judgment against the defendant personally all related to the same thing, to wit, the management by the defendant as trustee and executrix of property disposed of by their mother in her will, and a court of equity would in the same suit undertake to settle the other controversies growing out of the same subject matter, and grant the other relief indicated in the prayers relating to injunc-

tion and partition, although these, standing alone, could not be granted. Matson v. Crowe, 193 Ga. 578, 19 S.E.2d 288 (1942).

Suits in equity shall be tried in the county where a defendant resides against whom substantial relief is prayed; and one who would have equity must do equity. Hence equity, having the parties before the court rightfully, will proceed to give full relief to all parties in reference to the subject matter provided the court has jurisdiction thereof. Pearson v. George, 211 Ga. 18, 83 S.E.2d 593 (1954).

When court has jurisdiction for the purpose of giving injunctive relief against a nuisance, it could under the well-established law of this state retain it as to damages in order to do complete justice between the parties, and upon proper determination of the damages caused by each of the defendants could render judgment against them for their proportionate parts of the damage done. Vaughn v. Burnette, 211 Ga. 206, 84 S.E.2d 568 (1954).

Jurisdiction for final disposition of property. — An equity court, by the continuing receivership, has jurisdiction to make a final disposition of the property according to the respective interests of the parties, and to this end can order a division by sale if necessary. Roberts v. Federal Land Bank, 180 Ga. 832, 181 S.E. 180 (1935).

As general rule court of equity will not intervene to enjoin collection of tax when no execution has been issued and levied on any of the property of the taxpayer, even though the taxing authorities may have demanded that the taxpayer pay the tax. Warren v. Suttles, 190 Ga. 311, 9 S.E.2d 172 (1940).

When plaintiff's petition for injunction against tax collector's interference with a boxing exhibition and collection of tax alleged that the plaintiff had been notified by the tax collector that the plaintiff would not permit the plaintiff to stage the plaintiff's boxing bout if the tax was not paid, that the tax collector would carry out the tax collector's threat if not enjoined, and that such conduct would cause the plaintiff irreparable injury and damage, equity had jurisdiction and authority to grant an injunction under the facts when the petition was presented and sanctioned, and fact that at the time of the hearing part of the relief sought, enjoining the tax collector from closing the plaintiff's boxing exhibition, was no longer appropriate for consideration since the exhibition had been held under the protection of a temporary restraining order should not have prevented the court from retaining jurisdiction of the case for the purpose of determining the legality of the alleged tax and granting a permanent injunction against its collection. Warren v. Suttles, 190 Ga. 311, 9 S.E.2d 172 (1940).

Action for land may be included in petition for equitable relief. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941).

Cited in McKinney v. Powell, 149 Ga. 422, 100 S.E. 375 (1919); Calbeck v. Herrington, 169 Ga. 869, 152 S.E. 53 (1930); Georgia Creosoting Co. v. Moody, 41 Ga. App. 701, 154 S.E. 294 (1930); Holst v. City of La Grange, 175 Ga. 402, 165 S.E. 217 (1932); F.S. Royster Guano Co. v. Stedham, 178 Ga. 217, 172 S.E. 555 (1934); Justice v. Warner, 178 Ga. 579, 173 S.E. 703 (1934); Welch v. Williford, 182 Ga. 192, 185 S.E. 91 (1936); Voyles v. Federal Land Bank, 182 Ga. 569, 186 S.E. 405 (1936); Ellis v. Millen Hotel Co., 192 Ga. 66, 14 S.E.2d 565 (1941); Sangster v. Toledo Mfg. Co., 193 Ga. 685, 19 S.E.2d 723 (1942); Adcock v. Berry, 194 Ga. 243, 21 S.E.2d 605 (1942); Cummings v. Robinson, 194 Ga. 336, 21 S.E.2d 627 (1942); Pass v. Pass, 195 Ga. 155, 23 S.E.2d 697 (1942); Hughes v. Cobb, 195 Ga. 213, 23 S.E.2d 701 (1942); Robinson v. Murray, 198 Ga. 690, 32 S.E.2d 496 (1944); Fulmer v. Wilkins, 201 Ga. 322, 39 S.E.2d 405 (1946); Toler v. Goodin, 74 Ga. App. 468, 40 S.E.2d 214 (1946); Avary v. Avary, 202 Ga. 22, 41 S.E.2d 314 (1947); Parnell v. Wooten, 202 Ga. 443, 43 S.E.2d 673 (1947); Redmond v. Sinclair Ref. Co., 204 Ga. 699, 51 S.E.2d 409 (1949); Gaither v. Gaither, 206 Ga. 808, 58 S.E.2d 834 (1950); Salter v. Salter, 209 Ga. 90, 70 S.E.2d 453 (1952); Rountree v. Davis, 90 Ga. App. 223, 82 S.E.2d 716 (1954); Collins v. Dacus, 211 Ga. 779, 89 S.E.2d 198 (1955); Johnson v. Wilson, 212 Ga. 264, 91 S.E.2d 758 (1956); Lowry v. Rosenfeld, 213 Ga. 578, 100 S.E.2d 447 (1957); Ramsey v. Womack, 214 Ga. 722, 107 S.E.2d 180

(1959); Claxton v. Claxton, 214 Ga. 715, 107 S.E.2d 320 (1959); Brewton v. McLeod, 216 Ga. 686, 119 S.E.2d 105 (1961); Wright v. Florida-Georgia Tractor Co., 218 Ga. 824, 130 S.E.2d 736 (1963); Stith v. Willis, 219 Ga. 62, 131 S.E.2d 620 (1963); Simmons v. Watson, 221 Ga. 765, 147 S.E.2d 322 (1966); Harp v. Bacon, 222 Ga. 478, 150 S.E.2d 655 (1966); Georgia Power Co. v. City of Macon, 228 Ga. 641, 187 S.E.2d 262 (1972); Hill v. L/A Mgt. Corp., 234 Ga. 341, 216 S.E.2d 97 (1975); McArthur v. Southern Airways, Inc., 404 F. Supp. 508 (N.D. Ga. 1975); Gorman v. Gorman, 239 Ga. 312, 236 S.E.2d 652 (1977); Department of Natural Resources v. American Cyanamid Co., 239 Ga. 740, 238 S.E.2d 886 (1977); Harper v. Harper, 241 Ga. 19, 243 S.E.2d 74 (1978); Head v. Walker, 243 Ga. 108, 252 S.E.2d 440 (1979); Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982); Brown v. Brown, 265 Ga. 725, 462 S.E.2d 609 (1995); Smith v. Gwinnett County, 268 Ga. 179, 486 S.E.2d 151 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 46 et seq., 248.

C.J.S. — 30 C.J.S., Equity, § 68.

ALR. — Right to protection against simulation of physical appearance or arrangement of place of business or vehicle, 28 A.L.R. 114.

Right under general prayer to relief inconsistent with prayer for specific relief, 30 A.L.R. 1175.

Retention of jurisdiction in suit in equity to determine whole controversy, including amount of loss or damage, after setting aside an award or finding by arbitrators or appraisers, 112 A.L.R. 9.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 A.L.R.2d 1180.

23-1-8. Equity considers done what ought to be done.

Equity considers that done which ought to be done and directs its relief accordingly.

History. — Orig. Code 1863, § 3019; Code 1868, § 3031; Code 1873, § 3086; Code 1882, § 3086; Civil Code 1895, § 3926; Civil Code 1910, § 4523; Code 1933, § 37-106.

Law reviews. — For annual survey of local government law, see 58 Mercer L. Rev. 267 (2006).

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Equity treats as done that which in fairness ought to have been done. United States v. Ferguson, 409 F. Supp. 393 (S.D. Ga. 1975), aff'd, 529 F.2d 999 (5th Cir. 1976).

Prevention of forfeitures. — Since equity considers that done which ought to be done, it is therefore recognized that in order to prevent forfeitures, which are not favored, equity will lay hold upon any expressed intention of an insured to designate an eligible beneficiary, or any inchoate effort to designate a substituted beneficiary in lieu of a deceased one, when death or illness of the insured prevents the filling of such vacancy. Hewell v. Atlanta Police Relief Ass'n, 184 Ga. 702, 192 S.E. 828 (1937).

When the plaintiffs are alleged to constitute the sole survivors of the class which could be designated as beneficiaries of the defendant relief association, and for whose benefit the certificate was taken out and maintained, equity in the exercise of its jurisdiction will account that done which ought to have been done if opportunity had been given, and in order to avoid a forfeiture will treat such children, the

plaintiffs, as being in good conscience as much as the actual beneficiaries under the certificate as if the insured father had been afforded opportunity to name and had actually named them as such. Hewell v. Atlanta Police Relief Ass'n, 184 Ga. 702, 192 S.E. 828 (1937).

Equity in adoption proceeding. — Since equity considers that done which ought to have been done, equity will decree that a child is entitled to the fruits of a legal adoption when the act of formal adoption had not been consummated. Toler v. Goodin, 200 Ga. 527, 37 S.E.2d 609 (1946).

This section sets out the general principle on which a court of equity may, in a proper case, allow inheritance under the so-called doctrine of virtual adoption. Toler v. Goodin, 200 Ga. 527, 37 S.E.2d 609 (1946).

Despite the death of the party against whom relief is sought, equity will grant relief and decree that to be done which ought to have been done. Holsomback v. Caldwell, 218 Ga. 393, 128 S.E.2d 47 (1962).

Equity in foreclosure proceedings. — When to a proceeding to foreclose a deed to secure debt as an equitable mortgage, which prays for judgment for principal, interest, and attorney's fees, a debtor files a plea in which it is alleged that the petitioner held as collateral fire insurance policies with a loss-payable clause in favor of the petitioner aggregating more than the amount of the debt, which had become due and payable as the result of a fire some months before there was a default on the debt, and that the insurance could have been collected at any time, but was not collected due solely to the negligence of the petitioner who had made no demand for payment, and that the attorney's fees sought in the foreclosure proceeding would have been unnecessary had such collection been made, such plea alleged facts sufficient to show a breach of duty, both in law and in equity, upon the part of the creditor, which would prevent it from collecting attorney's fees and deny the creditor any relief in equity. Irwin v. Life & Cas. Ins. Co., 204 Ga. 582, 50 S.E.2d 354 (1948).

Equity in political offices. — Even though an appointment may have been made to an office when the term of the incumbent had not expired, and in pursuance of the order of appointment the incumbent had been forcibly removed from the room or quarters of the incumbent's office and thereby deprived of the opportunity of exercising the duties of the office, such incumbent will in equity continue to be treated as the incumbent for the purpose of protecting the incumbent in the incumbent's right to function as such official, pending a judicial determination of the validity of such appointment. Partain v. Maddox, 227 Ga. 623, 182 S.E.2d 450 (1971).

Equity in giving of security. — The court considers as actually having been performed acts which have been directed or which have agreed or intended to be done. Thus, an agreement to give security may, in a proper case, be deemed to have been executed by the giving of security. United States v. Ferguson, 409 F. Supp. 393 (S.D. Ga. 1975), aff'd, 529 F.2d 999 (5th Cir. 1976).

What should have been done must be determined. — Equitable maxim, codified at O.C.G.A. § 23-1-8, that equity considers that done which ought to be done and directs its relief accordingly, cannot be fulfilled when that which should have been done still remains to be determined. Wallace v. Wallace, 301 Ga. 195, 800 S.E.2d 303 (2017).

There may be valid contract to adopt without the express use of term "adopt" in contract. Toler v. Goodin, 200 Ga. 527, 37 S.E.2d 609 (1946).

Language clearly showing intent to effect an adoption according to the law, considered under the attendant and surrounding circumstances though not containing precise legal phraseology, is sufficient to create a virtual adoption. Toler v. Goodin, 200 Ga. 527, 37 S.E.2d 609 (1946).

An oral agreement to adopt may be shown by the acts, conduct, and admissions of the parties, and in order to establish such a contract, the exact word "adopt" need not be used. Toler v. Goodin, 200 Ga. 527, 37 S.E.2d 609 (1946).

In a case of virtual adoption the alleged agreement must be proved so clearly, strongly, and satisfactorily as to leave no reasonable doubt in the minds of the jury.

Toler v. Goodin, 200 Ga. 527, 37 S.E.2d 609 (1946).

An authenticated copy of an application of the parent for a homestead which contained the following question and answer, "If married, of whom does your family consist?" "My wife and adopted daughter and myself," was relevant in an action to prove a virtual adoption as illustrating whether there had been a contract to adopt the child, since it indicates that the child was living with the parents at that time. Toler v. Goodin, 200 Ga. 527, 37 S.E.2d 609 (1946).

A parol obligation of a person to adopt the child of another as one's own, accompanied by a virtual though not a statutory adoption, and acted upon by all parties concerned for many years and during the obligor's life, may be enforced in equity upon the death of the obligor by decreeing the child entitled as a child to the property of the obligor, undisposed of by will. Toler v. Goodin, 200 Ga. 527, 37 S.E.2d 609 (1946).

An agreement by a married couple that if the natural parent would relinquish all claims of all nature to the natural parent's child the couple would adopt the child as their own, would love the child and provide for the child fully all things essential to the child's welfare, and make the child their heir to inherit at their death as if the child had been their natural child, is sufficient to create a contract of adoption. Toler v. Goodin, 200 Ga. 527, 37 S.E.2d 609 (1946).

Equitable relief available under an indemnity contract. — After the Chapter 11 debtor's officer settled a lawsuit against the debtor and the officer without informing the debtor's successor of the settlement, as equitable relief under O.C.G.A. § 23-1-8, the officer was reimbursed under an indemnification clause only for an amount the debtor had previously authorized for settlement. In re First Am. Health Care of Ga., Inc., 288 B.R. 598 (Bankr. S.D. Ga. 2002).

Specific performance properly applied. — Specific performance was the proper remedy since there was no adequate remedy at law given the nature of the stock in the small, family-owned business, and the explicit acknowledgment in the shareholders' buy-sell agreement that specific performance was the appropriate remedy in the event of a breach. Moreover, given the failure of all parties to strictly follow the terms of either the agreement or bylaws, an equitable remedy considered that done which ought to be done. Wallace v. Wallace, 345 Ga. App. 764, 813 S.E.2d 428 (2018), cert. denied, No. S18C1329, 2019 Ga. LEXIS 42, cert. denied, No. S18C1332, 2019 Ga. LEXIS 48 (Ga. 2019), cert. denied, 2019 U.S. LEXIS 6165, 205 L. Ed. 2d 30 (U.S. 2019).

Determining beneficiary under pension plan. — Because a city employee asked for and completed forms given to the employee by the city's human resources department to change the beneficiary of the employee's retirement plan to the employee's brother, but was not given the correct form for that change by the human resources department, a trial court properly used the court's equity power to hold that the brother was entitled to the benefit. Westmoreland v. Westmoreland, 280 Ga. 33, 622 S.E.2d 328 (2005).

In pari delicto. — Georgia law follows the well-settled maxim that equity seeks to do equity, O.C.G.A. § 23-1-8, and the equitable doctrine of in pari delicto is based on the principle that to give the plaintiff relief would contravene public morals and impair the good of society; hence, it should not be applied in a case in which to withhold relief would, to a greater extent, offend public morals. Hays v. Paul, Hastings, Janofsky & Walker LLP, No. 1:06-CV-754-CAP, 2006 U.S. Dist. LEXIS 95849 (N.D. Ga. Sept. 14, 2006).

Consistent with O.C.G.A. § 23-1-8, the in pari delicto defense was inapplicable because liquidators were pursuing claims of fraudulent transfer, conspiracy, and procuring breach of fiduciary duty for the benefit of innocent creditors. Am. Pegasus SPC v. Clear Skies Holding Co., LLC, No. 1:13-CV-03035-ELR, 2015 U.S. Dist. LEXIS 189547 (N.D. Ga. Sept. 22, 2015).

Cited in Gilford v. Green, 33 Ga. App. 1, 125 S.E. 80 (1924); Richards v. Plaza Hotel, Inc., 171 Ga. 827, 156 S.E. 809 (1931); Rowe v. Cole, 176 Ga. 592, 168 S.E. 882 (1933); Biddle v. Papa, 180 Ga. 468, 179 S.E. 357 (1935); Rose v. Crane Heating

Co., 198 Ga. 295, 31 S.E.2d 717 (1944); Shaw v. Miller, 215 Ga. 413, 110 S.E.2d 759 (1959); Bair v. Willis, 218 Ga. 563, 129 S.E.2d 774 (1963); Stith v. Willis, 219 Ga. 62, 131 S.E.2d 620 (1963); Jordan Co. v. Bethlehem Steel Corp., 309 F. Supp. 148 (S.D. Ga. 1970); McArthur v. Southern Airways, Inc., 404 F. Supp. 508 (N.D. Ga. 1975); Prince v. Black, 256 Ga. 79, 344 S.E.2d 411 (1986); Brown v. Brown, 265 Ga. 725, 462 S.E.2d 609 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 126.

C.J.S. — 30 C.J.S., Equity, § 106.

ALR. — Constitutionality of statute conferring on chancery courts power to abate public nuisance, 22 A.L.R. 542; 75 A.L.R. 1298.

Power of equity in absence of statute to render deficiency judgment in foreclosure action, 34 A.L.R. 1015.

Validity and enforceability of restrictive covenants in contracts of employment, 52 A.L.R. 1362; 67 A.L.R. 1002; 98 A.L.R. 963.

Doctrine of equitable conversion in relation to taxation, 112 A.L.R. 23.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 A.L.R.2d 1180.

Rule denying recovery of property to one who conveyed to defraud creditors as applicable where claim which motivated the conveyance was never established, 6 A.L.R.4th 862.

23-1-9. Nature of equity is equality.

In many cases, equality is equity in the distribution of equitable assets.

History. — Orig. Code 1863, § 3023; Code 1868, § 3035; Code 1873, § 3090; Code 1882, § 3090; Civil Code 1895, § 3930; Civil Code 1910, § 4527; Code 1933, § 37-110.

Law reviews. — For note, "Georgia Becomes A Quasi Community Property State," see 17 Ga. St. B.J. 134 (1981).

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Cited in Trust Co. v. Kenny, 188 Ga. 243, 3 S.E.2d 553 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 125.

C.J.S. — 30 C.J.S., Equity, § 109.

23-1-10. Who would have equity must do equity.

He who would have equity must do equity and must give effect to all equitable rights of the other party respecting the subject matter of the action.

History. — Orig. Code 1863, § 3017; Code 1868, § 3029; Code 1873, § 3084; Code 1882, § 3084; Civil Code 1895, § 3924; Civil Code 1910, § 4521; Code 1933, § 37-104.

Law reviews. — For article discussing

the historical background of the doctrine of tender and the application in Georgia of tender requirements, and proposing reforms, see 21 Mercer L. Rev. 413 (1969).

For article discussing application of the principle that he who would have equity must do equity to taxpayer's suits, see 7 Ga. St. B.J. 305 (1971).

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General Consideration

The equitable maxim which is embodied in this section is a favorite maxim in equity. Duke v. Ayers, 163 Ga. 444, 136 S.E. 410 (1927); Autry v. Southern Ry., 167 Ga. 136, 144 S.E. 741 (1928).

This section contains one of the oldest and best settled and most familiar maxims in equity. It is applicable in every type of case, including unfair competition. Eastman Kodak Co. v. Fotomat Corp., 317 F. Supp. 304 (N.D. Ga. 1969), appeal dismissed, 441 F.2d 1079 (5th Cir. 1971).

This section is the basis for the "clean hands" doctrine. Partain v. Maddox, 227 Ga. 623, 182 S.E.2d 450 (1971).

One who comes into a court of equity with unclean hands must be denied relief. Musgrove v. Musgrove, 213 Ga. 610, 100 S.E.2d 577 (1957).

One will not be permitted to take advantage of one's own wrong. Musgrove v. Musgrove, 213 Ga. 610, 100 S.E.2d 577 (1957).

Equity in assessment proceedings. — When owners of property abutting upon streets attack an assessment, only on the ground that the assessment is excessive, the owners should pay or offer to pay what the owners admit to be due. City of Camilla v. Cochran, 160 Ga. 424, 128 S.E. 194 (1925).

Submission to jurisdiction. — This section requires that anyone going into a court and asking its aid shall submit oneself to the jurisdiction of the court and subject oneself to the imposition of such terms as well established equitable principles would require. Charleston & W.C. Ry. v. Hughes, 105 Ga. 1, 30 S.E. 972, 70 Am. St. R. 17 (1898).

Equity requires accounting for improvements. — When one cotenant comes into equity and seeks its aid to enforce one's title, equity, in decreeing the relief, will require one to account for the improvements. Holland Furnace Co. v. Lowe, 172 Ga. 815, 159 S.E. 277 (1931).

No evidence of inequitable conduct. — When the LLC granted the condominium association an easement to a perpetual non-exclusive right to access the LLC's private roadway system, there was no evidence of any inequitable conduct on the part of the LLC, which had consistently denied that the shuttle bus's passage through the gate during rush hour constituted a default under the easement, in an attempt to trap or deceive the association through the estoppel certificate; thus, the association did not show that there remained an issue of material fact as to the LLC's reasonable reliance on the estoppel certificate in the LLC's conveyance of real property to a third party. One Buckhead Loop Condo. Ass'n v. Regent Tower Holdings, 341 Ga. App. 5, 798 S.E.2d 633 (2017).

As a general rule, equity will not grant relief to a party who comes into court with unclean hands, or is guilty of an illegal or immoral act, nor aid a grantor or the grantor's administrator in seeking to cancel a security deed which was executed by the grantor for the purpose of hindering, delaying or defrauding creditors; these rules stem from the just and salutary principle that one will not be permitted to profit by the grantor's own wrong, and apply when a party is seeking the aid of equity in the enforcement of executory contracts or its aid under an executed contract. Fuller v. Fuller, 211 Ga.

201, 84 S.E.2d 665 (1954).

One with unclean hands cannot obtain relief in equity. Morgan v. Wright, 219 Ga. 385, 133 S.E.2d 341 (1963).

The deliberate attempt to take another man's wife from him, and entering into an engagement with her to marry at a time when she could not lawfully marry, and giving a ring to further such an unlawful engagement is a defiance of public policy and constitutes the rankest sort of unclean hands. Morgan v. Wright, 219 Ga. 385, 133 S.E.2d 341 (1963).

Equity may declare a trust to exist under the circumstances specified in this section, but will not do so at the insistence of a party who lacks clean hands with respect to those matters concerning which one seeks relief. Griggs v. Griggs, 242 Ga. 96, 249 S.E.2d 566 (1978).

Worker could not contend that equity should forbid the employer from asserting the worker's illegal status, based on the employer's failure to require that the worker complete the U.S. Department of Justice, Bureau of Immigration and Customs Enforcement Employment Eligibility Verification Form, since the worker filled out an employment application and provided the employer with a Social Security number which belonged to someone else. Martines v. Worley & Sons Constr., 278 Ga. App. 26, 628 S.E.2d 113 (2006).

Unclean hands shown. — In a post-divorce proceeding, a trial court did not err in refusing to hold a mother in contempt and by finding that the father came to court with unclean hands because the evidence showed that the mother did not obtain certain medical evaluations and treatments for the parties' children as previously ordered because the father had not paid child support, had not paid one-half of the medical expenses already incurred for the children, and the children's doctor refused to see the children anymore due to the father's belligerent conduct toward the doctor and staff, thus, the father did have unclean hands for failing to pay the expenses and by the conduct toward the doctor. Higdon v. Higdon, 321 Ga. App. 260, 739 S.E.2d 498 (2013).

Parent who caused property to be transferred to the parent's child to shield the property from the father's creditors was not entitled to judgment against the child because the parent had unclean hands, under O.C.G.A. § 23-1-10. Under O.C.G.A. § 18-2-74(a)(1), the transfer was fraudulent because the transfer was made with actual intent to hinder, delay, or defraud the parent's creditors. Roach v. Roach, 327 Ga. App. 513, 759 S.E.2d 587 (2014).

No unclean hands for violating unenforceable covenant. — Former employer's contention that the trial court erred by refusing to consider evidence of the former employee's unclean hands was rejected because the court acted well within the court's broad discretion when the court determined that the employee could not have unclean hands for violating an unenforceable covenant. Fortress Investment Group, LLC v. Holsinger, 354 Ga. App. 405, 841 S.E.2d 55 (2020).

This principle is applicable when one in an equity suit seeks both legal and equitable relief. One who avails oneself of an equitable remedy is as much bound by this principle as one who is asserting in such a court a purely equitable right. Wilder v. City of Atlanta, 40 Ga. App. 364, 149 S.E. 656 (1929); Snell v. Spalding Foundry Co., 180 Ga. 582, 180 S.E. 218 (1935); Wright v. City of Metter, 192 Ga. 75, 14 S.E.2d 443 (1941).

One who would have equity must do equity, and give effect to all equitable rights in the other party respecting the subject matter of the suit. This principle is applicable when one in an equity suit seeks both legal and equitable relief. Bass v. Mayor of Milledgeville, 180 Ga. 156, 178 S.E. 529 (1934), appeal dismissed, 295 U.S. 721, 55 S. Ct. 926, 79 L. Ed. 1675 (1935).

Inapplicable to action at law. — Equitable doctrine of unclean hands had no application to an action at law, and, in a suit seeking to recover on three promissory notes, a trial court was not authorized to reduce the amounts shown to be due and payable on the notes on account of its finding of unclean hands. Park v. Fortune Ptnr., Inc., 279 Ga. App. 268, 630 S.E.2d 871 (2006).

Relationship between acts required. — Under Georgia law, the un-

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clean hands doctrine does not attach to all prior bad acts. There must be a direct relationship between the equitable relief sought and the acts giving rise to the unclean hands. ABC Home Health Servs., Inc. v. IBM Corp., 158 F.R.D. 180 (S.D. Ga. 1994).

In a diversity contract dispute any relationship between the destruction of personal files on computer and software developer's equitable claims concerning Medicare reimbursements was merely tangential and would not support dismissal of developer's equitable counterclaims on the basis of unclean hands. ABC Home Health Servs., Inc. v. IBM Corp., 158 F.R.D. 180 (S.D. Ga. 1994).

Rule that one who would have equity must do equity refers to equitable rights respecting the subject matter of the action; it does not embrace outside matters. Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 Ga. 105, 181 S.E. 822 (1935).

The unclean hands maxim applies to equitable rights which relate directly to the cause of action; it does not embrace matters outside the subject matter of the action. Adams v. Crowell, 157 Ga. App. 576, 278 S.E.2d 151 (1981); Zappa v. Automotive Precision Mach., Inc., 205 Ga. App. 584, 423 S.E.2d 286 (1992).

In an action for specific performance, although it was found that the plaintiff's indebtedness had not been completely discharged, the clean hands doctrine did not apply because the court also found that the plaintiff was unaware of the existence or amount of the arrearages until the defendant testified about the arrearages at trial. Dobbs v. Dobbs, 270 Ga. 887, 515 S.E.2d 384 (1999).

Enforcement of third party rights. — A plaintiff with unclean hands who has proper standing may still bring an action to enforce the rights of others and secure relief on their behalf, even though doing so may result in an indirect benefit to the unclean plaintiff. West v. West, 825 F. Supp. 1033 (N.D. Ga. 1992).

Unclean hands maxim which bars a complainant in equity from obtaining relief has reference to an inequity which inflects the cause of action so that to entertain it would be violative of conscience; it must relate directly to the transaction concerning which complaint is made. Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 Ga. 105, 181 S.E. 822 (1935).

Rule that equity refuses to interfere when both parties are at fault does not apply when the faults are unequal. Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 Ga. 105, 181 S.E. 822 (1935).

An inequity that causes the invocation of the "clean hands" rule must relate directly to the transaction concerning which complaint is made. The rule refers to equitable rights respecting the subject matter of the action, and it does not embrace outside matters. Partain v. Maddox, 227 Ga. 623, 182 S.E.2d 450 (1971).

When a constitutional officer's previous act in complying with the Governor's demand for an undated resignation letter is unrelated to the relief sought in a judicial action seeking rightful possession of the constitutional office, no unclean hands are involved. Partain v. Maddox, 227 Ga. 623, 182 S.E.2d 450 (1971).

When husband deeded land to former wife in order to avoid any alimony claim against it by his second wife, doctrine of unclean hands barred husband's suit seeking to compel former wife to reconvey land to him on theory that she committed fraud on him in obtaining the deeds to the land. Williams v. Williams, 255 Ga. 264, 336 S.E.2d 244 (1985).

Not applicable when subject matter is marriage, not divorce. — Since the "subject matter" and "transaction concerning which relief is sought" was marriage between the parties, not a divorce action, application of the unclean hands doctrine was erroneous. Pryor v. Pryor, 263 Ga. 153, 429 S.E.2d 676 (1993).

Not applicable to child custody cases. — Maxim of unclean hands was inapplicable to child custody case, and, in any event, the father acted in good faith picking up the child after receiving a telephone call from the home of the grandmother. Lynch v. Horton, 302 Ga. App. 597, 692 S.E.2d 34 (2010), cert. denied,

563 U.S. 988, 131 S. Ct. 2447, 179 L. Ed. 2d 1210 (2011).

Real estate contracts. — Property owners were entitled to specific performance under O.C.G.A. § 23-2-130 of a settlement agreement by which a seller agreed to re-purchase their property for $1 million. The fact that the owners allegedly attempted to have a third party business avoid its separate contractual obligation owed to the seller did not relate to the enforcement of the settlement agreement and could not bar specific performance of the owners' contract with the seller. Hampton Island, LLC v. HAOP, LLC, 306 Ga. App. 542, 702 S.E.2d 770 (2010).

Quiet title action. — Trial court did not err in refusing to deny property owners' petition to quiet title due to unclean hands because adjoining landowners used a street for activities other than ingress and egress only occasionally, and there was no evidence that the owners observed those other uses on the owners two or three visits to the property prior to purchasing the property. Goodson v. Ford, 290 Ga. 662, 725 S.E.2d 229 (2012).

Cited in Mayor of Montezuma v. Brown Bros., 168 Ga. 1, 147 S.E. 80 (1929); Sheffield v. Preacher, 175 Ga. 719, 165 S.E. 742 (1932); Chapman v. McPherson, 177 Ga. 471, 170 S.E. 481 (1933); Shepard v. Veal, 178 Ga. 535, 173 S.E. 644 (1934); Stephens v. National Life Ins. Co., 179 Ga. 619, 176 S.E. 772 (1934); Gulf Oil Corp. v. Suburban Realty Co., 183 Ga. 847, 190 S.E. 179 (1937); Lee v. O'Quinn, 184 Ga. 44, 190 S.E. 564 (1937); Cooper v. Peevy, 185 Ga. 805, 196 S.E. 705 (1938); Aiken v. Armistead, 186 Ga. 368, 198 S.E. 237 (1938); Bowers v. Dolen, 187 Ga. 653, 1 S.E.2d 734 (1939); Harton v. Federal Land Bank, 187 Ga. 700, 2 S.E.2d 62 (1939); Interstate Bond Co. v. Cullars, 189 Ga. 283, 3 S.E.2d 756 (1939); Aven v. Steiner Cancer Hosp., 189 Ga. 126, 5 S.E.2d 356 (1939); Fulmore v. Macon Fed. Savs. & Loan Ass'n, 191 Ga. 151, 11 S.E.2d 790 (1940); Georgia Baptist Orphans Home, Inc. v. Moon, 192 Ga. 81, 14 S.E.2d 590 (1941); McMullen v. Carlton, 192 Ga. 282, 14 S.E.2d 719 (1941); Tanner v. Wilson, 193 Ga. 211, 17 S.E.2d 581 (1941); Behr v. City of Macon, 194 Ga. 334, 21 S.E.2d 169 (1942); Bray v. Malcolm, 194 Ga. 593, 22 S.E.2d 126 (1942); Raines v. Shipley, 197 Ga. 448, 29 S.E.2d 588 (1944); Allen v. Allen, 198 Ga. 269, 31 S.E.2d 483 (1944); Doolittle v. Bagwell, 199 Ga. 155, 33 S.E.2d 437 (1945); Jackson v. Jackson, 202 Ga. 634, 44 S.E.2d 250 (1947); Puckett v. Reese, 203 Ga. 716, 48 S.E.2d 297 (1948); Allen v. Wade, 203 Ga. 753, 48 S.E.2d 538 (1948); Reardon v. Bland, 206 Ga. 633, 58 S.E.2d 377 (1950); Vinson v. Citizens & S. Nat'l Bank, 208 Ga. 813, 69 S.E.2d 866 (1952); Carter v. City of Toccoa, 210 Ga. 167, 78 S.E.2d 487 (1953); Payne v. Jones, 211 Ga. 322, 86 S.E.2d 3 (1955); Miron Motel, Inc. v. Smith, 211 Ga. 864, 89 S.E.2d 643 (1955); Miller v. Levenson, 212 Ga. 496, 93 S.E.2d 753 (1956); Hardy v. Savannah Apts., Inc., 217 F. Supp. 649 (S.D. Ga. 1962); Pearl Optical, Inc. v. Pearle Optical of Ga., Inc., 218 Ga. 701, 130 S.E.2d 223 (1963); Williamson v. Cullom, 218 Ga. 740, 130 S.E.2d 715 (1963); Derrick v. Campbell, 219 Ga. 795, 136 S.E.2d 381 (1964); Walker v. Burns, 220 Ga. 467, 139 S.E.2d 389 (1964); Budreau v. Crawford, 222 Ga. 716, 152 S.E.2d 398 (1966); Straughan v. Brown, 223 Ga. 592, 157 S.E.2d 256 (1967); Hall v. Heard, 223 Ga. 659, 157 S.E.2d 445 (1967); Cowart v. Gay, 223 Ga. 635, 157 S.E.2d 466 (1967); O'Kelley v. Evans, 224 Ga. 49, 159 S.E.2d 418 (1968); Holcomb v. Approved Bancredit Corp., 225 Ga. 271, 167 S.E.2d 655 (1969); Bloodworth v. Bloodworth, 225 Ga. 379, 169 S.E.2d 150 (1969); Kiker v. Hefner, 409 F.2d 1067 (5th Cir. 1969); Harding v. City of Decatur, 226 Ga. 474, 175 S.E.2d 507 (1970); Harper v. Harper, 229 Ga. 583, 193 S.E.2d 616 (1972); Adams v. Smith, 129 Ga. App. 850, 201 S.E.2d 639 (1973); Berry v. Government Nat'l Mtg. Ass'n, 231 Ga. 503, 202 S.E.2d 450 (1973); Hill v. L/A Mgt. Corp., 234 Ga. 341, 216 S.E.2d 97 (1975); McArthur v. Southern Airways, Inc., 404 F. Supp. 508 (N.D. Ga. 1975); Wright v. Intercounty Properties, Ltd., 238 Ga. 492, 233 S.E.2d 160 (1977); First Nat'l Bank v. Blum, 141 Ga. App. 485, 233 S.E.2d 835 (1977); Williams v. Whitfield, 242 Ga. 639, 250 S.E.2d 486 (1978); Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 253 S.E.2d 82 (1979); Bloodworth v. Sandersville Prod. Credit Ass'n, 245 Ga. 40, 262 S.E.2d 804 (1980); Everson v. Franklin Disct. Co., 248

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Ga. 811, 285 S.E.2d 530 (1982); Bank of Danielsville v. Seagraves, 167 Ga. App. 135, 305 S.E.2d 790 (1983); Murawski v. Roland Well Drilling, Inc., 188 Ga. App. 760, 374 S.E.2d 207 (1988); Holland Elec., Heating & Plumbing Co. v. Holland Heating & Air Conditioning, Inc., 259 Ga. 256, 379 S.E.2d 404 (1989); Dixon v. Murphy, 259 Ga. 643, 385 S.E.2d 408 (1989); City of Duluth v. Riverbrooke Properties, Inc., 233 Ga. App. 46, 502 S.E.2d 806 (1998); Rose v. Cain, 247 Ga. App. 481, 544 S.E.2d 453 (2001); Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC, 262 Ga. App. 457, 585 S.E.2d 643 (2003); Bishop Eddie Long Ministries, Inc. v. Dillard, 272 Ga. App. 894, 613 S.E.2d 673 (2005); Wyatt Processing, LLC v. Bell Irrigation Inc., 298 Ga. App. 35, 679 S.E.2d 63 (2009); Wallace v. Wallace, 345 Ga. App. 764, 813 S.E.2d 428 (2018).

Jurisdiction

Jurisdiction. — Suits in equity shall be tried in the county where a defendant resides against whom substantial relief is prayed; and the defendant who would have equity must do equity, hence equity, having the parties before the court rightfully, will proceed to give full relief to all parties in reference to the subject matter provided the court has jurisdiction thereof. Pearson v. George, 211 Ga. 18, 83 S.E.2d 593 (1954).

This section has no relation to the subject matter of a suit to cancel a judgment for alimony that is void for want of jurisdiction, and under which judgment the former wife has no equitable rights to which the former husband should give effect. Gaither v. Gaither, 205 Ga. 572, 54 S.E.2d 600 (1949).

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Section applicable when both legal and equitable relief sought. — The principle established by this section is as well applicable when one in an equity suit seeks both legal and equitable relief, as when one seeks a purely equitable right. Montgomery v. City of Atlanta, 162 Ga. 534, 134 S.E. 152 (1926).

A plaintiff cannot come into equity without first paying or tendering any amount admitted to be due. Pass v. Pass, 195 Ga. 155, 23 S.E.2d 697 (1942).

Trial court properly granted the supplier summary judgment on the purchaser's wrongful foreclosure claim because it was undisputed that the purchaser accepted and failed to repay at least $6,000 of the loan proceeds and failed to tender any amount in connection with the purchaser's claim of wrongful foreclosure. Sure, Inc. v. Premier Petroleum, Inc., 343 Ga. App. 219, 807 S.E.2d 19 (2017).

Before equity will hearken unto a suitor's prayer for equitable relief, one must offer to do full and complete equity to one's adversary. Renfroe v. Butts, 192 Ga. 720, 16 S.E.2d 551 (1941).

A party is not obliged to return that which one will be entitled to retain, as a condition to a cancellation; so, if a plaintiff has received no more than one was entitled to, one's offer to account for the same in adjustment of the differences between the parties sufficiently meets the requirement that one who seeks equity must do equity. Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326 (1950).

Deposit with court is not tender to lender. — In a wrongful foreclosure action, the trial court erred enjoining the lender's foreclosure proceedings because the borrowers failed to tender the amount owed under the matured home equity line of credit (HELOC) agreement to the lender in order to avoid foreclosure. Deposit of the funds in the court's registry did not constitute a tender to the lender. Oconee Fed. S & L Ass'n v. Brown, 349 Ga. App. 54, 825 S.E.2d 456 (2019).

The mere untimely payment of premiums, standing alone, when such untimely payments were accepted by the insurer would not constitute a failure "to do equity." Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973).

Equity refuses to aid any suitor who fails to do equity to the opposite party respecting the subject matter of the suit. Irwin v. Life & Cas. Ins. Co., 204 Ga. 582, 50 S.E.2d 354 (1948).

If the fault of one decidedly overbalances the other, equity may inter-

fere. Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 Ga. 105, 181 S.E. 822 (1935).

In order to do equity, a plaintiff is not obliged to return that which one will be entitled to retain. Dumas v. Dumas, 206 Ga. 767, 58 S.E.2d 830 (1950).

Defendant should not be compelled to perform unless the defendant receives the agreed exchange which is a condition of the defendant's performance under the contract. Krauth v. Bagley, 243 Ga. 87, 252 S.E.2d 504 (1979).

Equity will not decree the cancellation of an instrument when anything of value has been received until repayment is either made or tendered, or the defendant has stated that, should a tender be made, it would be refused. Wilson v. McAteer, 206 Ga. 835, 59 S.E.2d 252 (1950).

When the plaintiff is seeking affirmative relief in a court of equity, the plaintiff cannot have the relief sought without observing the equities of the transaction. Atlanta Banking & Sav. Co. v. Johnson, 179 Ga. 313, 175 S.E. 904 (1934).

Unclean hands not shown. — Plaintiff (1) did not lack clean hands in a suit wherein plaintiff successfully obtained a permanent injunction against defendant from engaging in a commercial business on defendant's residential property, and (2) did not violate the restrictive covenant by engaging in court reporting work on a home computer and receiving business mail at plaintiff's residence because such activities did not increase the traffic in the subdivision and did not have any effect on the value, status, stability, and residential character of plaintiff's home or the subdivision, unlike defendant's parking of cement trucks and other commercial vehicles at defendant's home. Roberts v. Lee, 289 Ga. App. 714, 658 S.E.2d 258 (2008).

Unclean hands issue not amendable to summary judgment. — Denial of summary judgment on the plaintiff's affirmative unclean hands defense to the defendant's counterclaim for a prescriptive easement was affirmed because whether the defendant acted inequitably was a question of fact not amendable to summary judgment. Sorrow v. 380 Properties, LLC, 354 Ga. App. 118, 840 S.E.2d 470 (2020).

Lender's successor who sought equitable relief based on forged deed not entitled to relief. — In an action by a lender's successor seeking equitable relief based on the lender's failure to obtain a signed security deed at the time of a refinancing, because a filed copy of the security deed bearing the purported signatures of the borrowers was forged, the successor had unclean hands, O.C.G.A. § 23-1-10, and was not entitled to relief. Bank of N.Y. Mellon v. Edmondson, 344 Ga. App. 823, 812 S.E.2d 299 (2018).

A party seeking specific performance of a contract must show substantial compliance with that party's part of the agreement in order to be entitled to a decree. Kirk v. First Ga. Inv. Corp., 239 Ga. 171, 236 S.E.2d 254 (1977).

Impact of subsequent default. — When the plaintiff is not in default when the plaintiff files suit, the occurrence of a subsequent default of the plaintiff is not by itself a sufficient reason for denying specific performance. Jordan v. Flynt, 240 Ga. 359, 240 S.E.2d 858 (1977).

Payment of amount admittedly due. — Under application of this maxim, before a borrower who has executed a deed to secure a debt can have affirmative equitable relief such as the setting aside of a sale by the creditor under exercise of a power contained in a security deed, and injunction against the creditor and persons claiming under the creditor, to prevent interference with the debtor's possession of the property, such debtor must pay or tender to the creditor the principal and interest due. Biggers v. Home Bldg. & Loan Ass'n, 179 Ga. 429, 176 S.E. 38 (1934); Redwine v. Frizzell, 184 Ga. 230, 190 S.E. 789 (1937).

One seeking to enjoin the enforcement of an execution, on the ground that usury has been computed thereon, must first offer to pay the amount admitted or shown to be due, before a court of equity would intervene in one's behalf. Sharpe v. City of Waycross, 185 Ga. 208, 194 S.E. 522 (1937).

When a petition seeking to enjoin the enforcement of a paving assessment exe-

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cution of the ground of dormancy shows on its face, as a matter of law, that a portion of such execution has not become dormant and is still due and unpaid, such petition fails to set forth a cause of action for the relief sought, in the absence of any tender or offer to pay the sums shown to be due. Sharpe v. City of Waycross, 185 Ga. 208, 194 S.E. 522 (1937).

Pursuant to the basic principle of equity, in this section a borrower who has executed a deed to secure debt is not entitled to an injunction against a sale of the property under a power in the deed, unless the borrower first pays or tenders to the creditor the amount admittedly due. This is true notwithstanding any allegation that the defendant has breached some independent covenant. Bower v. Certain-Teed Prod. Corp., 216 Ga. 646, 119 S.E.2d 5 (1961); Wright v. Intercounty Properties, Ltd., 238 Ga. 492, 233 S.E.2d 160 (1977); P.B.R. Enters., Inc. v. Perren, 243 Ga. 280, 253 S.E.2d 765 (1979).

In order to enable plaintiffs to come into equity it is essential in the first instance that they should have paid or tendered the amount admitted to be due. Failure to pay or tender to the defendant the full amount before filing the petition stands as a bar to any of the relief sought, and the defect is fatal to the further prosecution of the action. State Mut. Ins. Co. v. Strickland, 218 Ga. 94, 126 S.E.2d 683 (1962).

A borrower who has executed a deed to secure debt is not entitled to an injunction against a sale of the property under a power in the deed, unless he first pays or tenders to the creditor the amount admittedly due. The same rule applies when one standing in the place of the borrower seeks an injunction to prevent a transferee or assignee of such deed from selling the property for the purpose of satisfying the secured debt. Crockett v. Oliver, 218 Ga. 620, 129 S.E.2d 806 (1963).

In a suit by plaintiff-debtor seeking cancellation of a note and security deed, the failure to offer payment or tender of the balance due on the loan or to offer any excuse for not doing so brings the plaintiff under the provisions of this section. Coile v. Finance Co. of Am., 221 Ga. 584, 146 S.E.2d 304 (1965).

Before one who has given a deed to secure one's debt can have set aside in equity a sale by the creditor in exercise of the power conferred by the deed, and injunction to prevent interference with the debtor's possession of the property conveyed by the deed, one must pay or tender to the creditor the amount of principal and interest due. Coile v. Finance Co. of Am., 221 Ga. 584, 146 S.E.2d 304 (1965).

Refusal of injunction when no payment. — When one brings a petition in equity seeking to enjoin a sale under a power of sale contained in a security deed, which deed contains an acceleration clause, alleging as ground for injunction that one is entitled to a credit on the indebtedness secured thereby, "and that the proper application of said credit will liquidate all of the installments claimed to be in arrears, leaving nothing past due on said indebtedness," and when, on interlocutory hearing, it appears from the evidence that upon proper application of the alleged credit there would still be a considerable amount past due, and there is no offer to pay or tender to the grantee in the security deed of the amounts due thereunder, it is not error for the judge to refuse to grant an injunction. Brinson v. Federal Land Bank, 182 Ga. 477, 185 S.E. 828 (1936).

Benefits to opposite party prior to cancellation. — Before a borrower who has executed to the same grantee two deeds to secure debts can have affirmative equitable relief to set aside a sale by the creditor under exercise of the power of sale contained in the deeds, and an injunction against the creditor and the persons claiming under the creditor to prevent interference with the debtor's possession of a portion of the property, such debtor must pay or tender to the creditor the principal and interest which the debtor admits to be due, and would not be relieved of this duty by reason of the fact that the creditor was demanding of the debtor more than the debtor owed. Harpe v. Stone, 212 Ga. 341, 92 S.E.2d 522 (1956).

Before an instrument can be canceled the benefits received thereunder must be returned or tendered to the opposite party. Brooks v. Southern Clays, Inc., 220 Ga. 152, 137 S.E.2d 630 (1964).

Before a borrower, who has executed a deed infected with usury, can have affirmative equitable relief, such as injunction to prevent exercise of the power of sale by the grantee in such security deed, one must pay or tender to the grantee the principal sum due. I.D.S. Homes Corp. v. Lucas, 228 Ga. 521, 186 S.E.2d 745 (1972).

An offer to restore whatever of value one has received under a contract is a condition precedent to bringing an action for cancellation or rescission of the contract, and such tender must be made before such action is commenced. Dimmick v. Pullen, 224 Ga. 452, 162 S.E.2d 427 (1968).

A tender of the past due payments under indebtedness evidenced by deeds to secure debt must be made when a complainant seeks the aid of equity in setting aside and cancelling a deed under a foreclosure sale. Keith v. Yarbrough, 231 Ga. 770, 204 S.E.2d 111 (1974).

Municipalities must also do equity. — When a municipality makes proof of its claim to the superintendent of banks (now commissioner of banking and finance) on the basis of a creditor and obtains from the superintendent of banks one or more dividends on an equal basis with general depositors, before the municipality would be authorized to come into equity seeking to declare an implied trust to be impressed upon the general funds remaining in the hands of the superintendent of banks and priority over general depositors in the distribution of such funds, it would be necessary for the municipality to do equity by returning such portion of the dividends received by it as were derived from assessments against stockholders. Town of Douglasville v. Mobley, 169 Ga. 53, 149 S.E. 575 (1929).

Ready and willing to pay is not sufficient. — One seeking equitable relief from the enforcement of a tax execution based upon an assessment allegedly excessive, or for other cause, but admitting, as here, that one owes a part of the tax covered by such execution, must, prior to the institution of an equitable action for cancellation and injunction, pay or offer to pay the amount of taxes admitted to be due, in order to obtain the relief sought. An allegation that one is "ready and willing to pay" an amount of tax admitted to be due is not an "offer" to pay as required by law. Zugar v. Scarbrough, 186 Ga. 310, 197 S.E. 854 (1938); Holloway v. De Vane, 212 Ga. 182, 91 S.E.2d 350 (1956).

Payment of certain taxes before seeking relief. — One seeking relief from excessive tax levies, but admitting, either expressly or by necessary implication, that he owes part of the tax covered by such executions, must pay or offer to pay the amount of the taxes admitted to be due, in order to obtain the relief sought. Pierce Trading Co. v. City of Blackshear, 182 Ga. 649, 186 S.E. 721 (1936); Elder v. Home Bldg. & Loan Ass'n, 185 Ga. 258, 194 S.E. 745 (1937); Clisby v. City of Macon, 191 Ga. 749, 13 S.E.2d 772 (1941); Kiker v. Hefner, 224 Ga. 511, 162 S.E.2d 731 (1968); Adcock v. Sutton, 224 Ga. 505, 162 S.E.2d 732 (1968); Allen v. Thomas, 225 Ga. 650, 171 S.E.2d 132 (1969).

Petition seeking an injunction either to restrain tax sales or to prevent a continuation of the alleged discriminatory assessment practice, was fatally defective for its failure to allege a tender at least of the amounts which would have been due by the plaintiffs as taxes if their real estate had been assessed for taxation at the lowest basis of value applied to the more favorably treated personalty. Mayor of Savannah v. Fawcett, 186 Ga. 132, 197 S.E. 253 (1938).

In suit to cancel a tax deed upon the ground of excessive levy, seeking an accounting as to some of the defendants and general relief as to all of the defendants when it appeared from allegations of the petition that each of the defendants was liable to the plaintiffs for trespass upon the property in a sum greater than the amount of the taxes for which the property was sold, and that the plaintiffs were willing to do equity, the allegations in regard to excessive levy and the prayer for cancellation on that ground were not deficient for failure of the plaintiffs to allege a previous tender of the amount of the taxes. Zugar v. Scarbrough, 186 Ga. 310, 197 S.E. 854 (1938).

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A tax sale that is not specifically attacked on the ground that the levy of the execution was excessive, but is attacked on the ground that the sheriff failed to sell the realty levied on according to the advertisement of sale, which recited that so much of the realty levied on would be sold as was sufficient to satisfy the executions, and instead sold the realty in bulk although the realty was capable of subdivision into lots or tracts less than the whole which could have been sold for the amount of the executions, would not prevent the application of this equitable principle. Durham v. Smith, 186 Ga. 565, 198 S.E. 734 (1938).

One who by inheritance succeeds to the interest of such original owner in the property will not be heard in equity when seeking to cancel the deed of the purchaser at such sale, on the ground that the levy was excessive, without paying or offering to pay all unpaid taxes due on that property when the ownership thereon was in the person from whom it was inherited. Lowe v. City of Atlanta, 191 Ga. 76, 11 S.E.2d 891 (1940), later appeal, 194 Ga. 317, 21 S.E.2d 171 (1942).

One seeking relief against collection of municipal taxes on the ground of excessiveness of the levies, or for other cause, but admitting, either expressly or by necessary implication, that one owes part of the tax covered by such executions, must pay or offer to pay the amount of the taxes admitted to be due, in order to obtain the relief sought. Kent v. Mayor of Alamo, 193 Ga. 445, 18 S.E.2d 769 (1942).

When a taxpayer makes a tax return of property subject to ad valorem tax, he admits that there is a liability for taxes on the property returned and the taxpayer must pay or offer to pay the amount of taxes admitted to be due, in order to obtain the relief from overassessment. Trust Inv. & Dev. Co. v. City of Marietta, 216 Ga. 788, 119 S.E.2d 568 (1961).

When there is no allegation in a petition that property owners have paid or offered to pay the city any amount as the taxes due on the property, the owners are for such failure in no position to apply to a court of equity to enjoin the city from selling their property under executions for taxes due. Smith v. City of E. Ellijay, 217 Ga. 364, 122 S.E.2d 112 (1961).

When a taxpayer seeks to prevent the collection of an ad valorem tax, and the taxpayer admits, either expressly or impliedly, that the taxpayer is liable for at least a part of the tax sought to be collected the taxpayer must first pay or offer to pay the amount of the tax legally due, before enjoining the tax's collection. Freeman v. Keaton, 223 Ga. 505, 156 S.E.2d 347 (1967).

Those who seek the aid of a court of equity to restrain and enjoin the taxing authorities of a county from collecting or attempting to collect taxes alleged to have been illegally assessed against the property of the petitioners, and alleging in their petition, and thus admitting thereby, that they owe some taxes for the year in question, must show that they have tendered and offered to pay the amount of taxes in fact due in order to obtain the relief sought. Freeman v. Keaton, 223 Ga. 505, 156 S.E.2d 347 (1967).

Application of equity in realty transactions. — As a general rule a petition to a court of equity to cancel a deed as a cloud on the title of the grantor, brought by the executrices of the grantor's estate, on the basis that it is void as representing a sale by a wife of her separate estate to her husband, for a valuable consideration, without an order of the superior court of her domicile, when there is no offer to return the consideration recited and acknowledged in the deed to have been received, is demurrable (now motion to dismiss), but when it is alleged in an amendment to the petition that the consideration stated in the deed from the wife to the husband has been only partly paid to a stated amount, that the defendant has been in possession of the property so conveyed for a stated number of years, that the rents, issues, and profits for that period are at least a stated amount, and an offer is made to pay the defendant any difference between the consideration actually paid and the rents, issues, and profits, and the petition contains a prayer for general relief as well as for cancellation and injunction, such allegation by amendment is a sufficient com-

pliance with the requirements of this section, and it is not necessary that a formal tender of the consideration stated in the deed be made. Franklin v. Cruce, 187 Ga. 58, 200 S.E. 135 (1938).

A borrower who has executed a deed to secure a debt is not entitled to an injunction against a sale of the property under a power in the deed, unless one first pays or tenders to the creditor the amount admittedly due. Oliver v. Slack, 192 Ga. 7, 14 S.E.2d 593 (1941); Cook v. Young, 225 Ga. 26, 165 S.E.2d 727 (1969).

In suit by wife for injunction against sale of property under deed, if the petition has shown upon its face, either expressly or impliedly, that any part of the purchase-money had been paid by or for the bank, or that any binding obligation for such payment had been made, it may be that the plaintiff could not maintain an action for equitable relief without averring a repayment of the sum or a tender thereof before suit, or alleging some valid reason for her failure to do so. Deen v. Baxley State Bank, 192 Ga. 300, 15 S.E.2d 194 (1941).

When vendees of land may have been excused from tendering the correct amount, or any amount, to the vendor before suit for specific performance, this does not relieve the vendor from offering in their pleadings to pay the amount which is due or the amount which might be found due by decree of the court. Lively v. Munday, 201 Ga. 409, 40 S.E.2d 62 (1946).

In a suit by a purchaser for specific performance of a contract for the sale of land, it should be made to appear that before institution of the action the plaintiff had paid or tendered the purchase-money according to the contract, or that tender had been waived by the defendant. Washington Mfg. Co. v. Wickersham, 201 Ga. 635, 40 S.E.2d 206 (1946).

Purchaser seeking specific performance of contract of purchase of realty is required to do equity by tendering the amount admittedly due under the contract in order to obtain the relief sought. Shepard v. Gettys, 206 Ga. 392, 57 S.E.2d 272 (1950).

When purchaser seeking performance of contract of purchase of realty offered to do equity by paying the full amount of the purchase price, but the defendant repudiated the contract and declared the defendant's intentions not to carry out the contract, the defendant's repudiation was a waiver of tender, and under the law relieved the petitioner of any obligation to tender. Shepard v. Gettys, 206 Ga. 392, 57 S.E.2d 272 (1950).

Trial court did not err by dismissing a homeowner's claim against the homeowner's mortgage lender for injunctive relief following foreclosure of the homeowner's home because under application of the maxim that one who would have equity must do equity, O.C.G.A. § 23-1-10, the owner was required to tender the amount due under the security deed and note. Stewart v. SunTrust Mortg., Inc., 331 Ga. App. 635, 770 S.E.2d 892 (2015).

When one party in default. — Since a defendant is not required to perform under the terms of a contract if the plaintiff is currently in default, specific performance may not be decreed against appellee unless it is conditioned on appellant's curing of any default on the appellant's part, but if the decree is so conditioned, this section will be satisfied. Jordan v. Flynt, 240 Ga. 359, 240 S.E.2d 858 (1977); Krauth v. Bagley, 243 Ga. 87, 252 S.E.2d 504 (1979).

The decree of specific performance is improper when the plaintiff was in default at the time suit was filed, the plaintiff remains in default at the time of the decree, and the decree of specific performance is not conditional on the plaintiff curing the plaintiff's default. Jordan v. Flynt, 240 Ga. 359, 240 S.E.2d 858 (1977).

Plaintiff defaulting after filing suit. — When the plaintiff is not in default when the plaintiff files suit, the occurrence of a subsequent default of the plaintiff is not by itself a sufficient reason for denying specific performance. Krauth v. Bagley, 243 Ga. 87, 252 S.E.2d 504 (1979).

Cancellation of deed when parties not in compliance — Petition for cancellation of deed was not subject to demurrer (now motion to dismiss) because the petitioner failed to tender to the defendant moneys paid for taxes, improvements, interest, and payment on loan, as well as the

Pleading and Practice (Cont'd)

consideration paid by the defendant to the plaintiff, when the petition alleged that no part of the consideration named in the deed had been paid and that the rent collected by the defendant was enough to have paid the installments and interest due against that property, and there was nothing in the record to indicate that any improvements were made by the defendant, or any taxes paid by the defendant. Wellborn v. Johnson, 204 Ga. 389, 50 S.E.2d 16 (1948).

Prerequisites to recovery following tax sale. — While ordinarily, before one would be entitled to set aside a tax sale on the grounds that the levy under the execution was excessive, one must tender to the purchaser at such sale the amount paid by such purchaser at the sale, no such tender is required when the petition alleges that the purchaser had not paid any part of the amount of its bid to the sheriff. Bibb County v. Elkan, 184 Ga. 520, 192 S.E. 7 (1937); Durham v. Smith, 186 Ga. 565, 198 S.E. 734 (1938).

Generally, equity will not cancel a conveyance under which anything has been received, until repayment is made. An exception to the rule requiring tender is when the petition alleges that the defendant has been in possession, receiving the rents and profits of the premises conveyed, and prays for an accounting therefor by the defendant, and that the correct amount due the defendant be declared and set up. Harrell v. Burch, 195 Ga. 96, 23 S.E.2d 434 (1942).

Uncertainity of tax execution impacting equity. — Allegations of a petition that the petitioner's mutual savings and loan association has been unable to ascertain the exact amount that a tax execution should have issued for, and that the taxing authorities of the city have "refused to ascertain the exact amount legally due by" petitioner, when considered in the light of the fact that the city contends that the total amount of the execution is the amount "legally due" and that the ascertainment of the amount for which the petitioner contends the execution should have issued is a mere matter of mathematical calculation, based upon the valuation of the property which the petitioner admits is legally taxable and the tax rate applicable thereto, do not allege a sufficient reason for the failure of the petitioner to pay or offer to pay the amount admittedly due. Elder v. Home Bldg. & Loan Ass'n, 185 Ga. 258, 194 S.E. 745 (1937).

Denial of relief in equity. — When to a proceeding to foreclose a deed to secure debt as an equitable mortgage, which prays for judgment for principal, interest, and attorney's fees, a debtor files a plea in which it is alleged that the petitioner held as collateral fire insurance policies with a loss-payable clause in favor of the petitioner aggregating more than the amount of the debt, which had become due and payable as the result of a fire some months before there was a default on the debt, and that the insurance could have been collected at any time, but was not collected due solely to the negligence of the petitioner who had made no demand for payment, and that the attorney's fees sought in the foreclosure proceeding would have been unnecessary had such collection been made, such plea alleged facts sufficient to show a breach of duty, both in law and in equity, upon the part of the creditor, which would prevent it from collecting attorney's fees and deny the creditor any relief in equity. Irwin v. Life & Cas. Ins. Co., 204 Ga. 582, 50 S.E.2d 354 (1948).

Payment of additional expenses. — When the creditor has negligently failed to perform the creditor's duty, which results in default on the main debt, the resulting injury or additional expense should be paid by the creditor rather than by the debtors. Irwin v. Life & Cas. Ins. Co., 204 Ga. 582, 50 S.E.2d 354 (1948).

Specific performance denied. — In a suit for specific performance, the trial court erred by granting summary judgment to the plaintiff because numerous fact issues remained, including whether the plaintiff made the requisite tender of the necessary documents and payment, whether the plaintiff's execution of corporate loan documents constituted a breach of the agreement and, if so, whether the breach was material, whether unclean hands barred the plaintiff's specific per-

formance claim, and other issues. Krieger v. Bonds, 333 Ga. App. 19, 775 S.E.2d 264 (2015).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 131 et seq.

C.J.S. — 30 C.J.S., Equity, § 90 et seq.

ALR. — He who comes into equity must come with clean hands, 4 A.L.R. 44.

Right of victim of practical joke to recover against its perpetrator, 9 A.L.R. 364.

Unfitness as affecting right to restoration by mandamus to office from which one has been illegally removed, 36 A.L.R. 508.

Rule that denies remedy in case of an illegal contract as applicable to an action of conversion, replevin, or detinue for property possession of which was obtained by defendant, or by a third person through whom he claims, as the result of such a contract with the plaintiff or his predecessor in interest, 132 A.L.R. 619.

Rule denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was paid or was never established, 21 A.L.R.2d 589.

Vendee's liability for use and occupancy of premises, where vendor disaffirms an unenforceable land contract, 49 A.L.R.2d 1169.

Purchaser's misrepresentations as to intended use of real property as ground for vendor's equitable relief from contract and deed, 35 A.L.R.3d 1369.

Rule denying recovery of property to one who conveyed to defraud creditors as applicable where claim which motivated the conveyance was never established, 6 A.L.R.4th 862.

23-1-11. Effect of equal equities; effect of unequal equities.

Where equities are equal, the law shall prevail. If equities are unequal, the superior equity shall prevail. Superior diligence as to time will create such inequality.

History. — Orig. Code 1863, § 3020; Code 1868, § 3032; Code 1873, § 3087; Code 1882, § 3087; Civil Code 1895, § 3927; Civil Code 1910, § 4524; Code 1933, § 37-107.

Law reviews. — For note, the voluntary-payment doctrine in Georgia, see 16 Ga. L. Rev. 893 (1982).

JUDICIAL DECISIONS

Superior equity entitled to relief. — When considering all the facts presented in the case, the equities in favor of lot owners were superior to those of a county, the trial court abused the court's discretion in ordering equitable relief permitting the county to disconnect water service to the subdivision. Cantrell v. Henry County, 250 Ga. 822, 301 S.E.2d 870 (1983).

Cited in Biddle v. Papa, 180 Ga. 468, 179 S.E. 357 (1935); Rose v. Crane Heating Co., 198 Ga. 295, 31 S.E.2d 717 (1944); Jordan Co. v. Bethlehem Steel Corp., 309 F. Supp. 148 (S.D. Ga. 1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 150.

C.J.S. — 30 C.J.S., Equity, §§ 110, 111.

23-1-12. Equity of misled party superior.

The equity of a party who has been misled is superior to that of the person who willfully misleads such party.

History. — Orig. Code 1863, § 3022; Code 1868, § 3034; Code 1873, § 3089; Code 1882, § 3089; Civil Code 1895, § 3929; Civil Code 1910, § 4526; Code 1933, § 37-109.

JUDICIAL DECISIONS

Cited in Frye v. Sims, 144 Ga. 74, 86 S.E. 249 (1915); Brown v. Brown, 209 Ga. 620, 75 S.E.2d 13 (1953); Levy v. Empire Ins. Co., 379 F.2d 860 (5th Cir. 1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20.

C.J.S. — 30 C.J.S., Equity, § 48 et seq.

ALR. — Right of victim of practical joke to recover against its perpetrator, 9 A.L.R. 364.

23-1-13. Volunteer's equity inferior.

The equity under trust or contract for value is superior to that of a mere volunteer.

History. — Orig. Code 1863, § 3021; Code 1868, § 3033; Code 1873, § 3088; Code 1882, § 3088; Civil Code 1895, § 3928; Civil Code 1910, § 4525; Code 1933, § 37-108.

JUDICIAL DECISIONS

A donee claiming land under a deed of gift stands in the shoes of the donee's grantor. Hughes v. Cobb, 195 Ga. 213, 23 S.E.2d 701 (1942).

Cited in Payton v. Payton, 148 Ga. 486, 97 S.E. 69 (1918); Cain v. Varnadore, 171 Ga. 497, 156 S.E. 216 (1930).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Equity, § 89.

ALR. — Relaxation of common-law rule regarding recovery of voluntary payment, 75 A.L.R. 658.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 A.L.R.2d 1180.

23-1-14. Who bears loss from act of third party.

When one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury shall bear the loss.

History. — Civil Code 1895, § 3940; Civil Code 1910, § 4537; Code 1933, § 37-113.

History of Code section. — The language of this Code section is derived in part from the decision in Blaisdell v. Bohr, 77 Ga. 381 (1886).

JUDICIAL DECISIONS

Analysis

General Consideration
Fraud Generally
Equitable Estoppel

General Consideration

This section is limited in its application to cases in which the party chargeable makes the third party the party's real or apparent agent, cases in which the party provides the means intentionally, or for a dishonest purpose, or negligently, and cases in which the party derives a benefit from the fraud of the third party. Nowell v. Mayor of Monroe, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

This section does not govern the great majority of cases when one innocently, for an honest purpose and with reasonable care, furnishes to a third party the means by which one perpetrates a fraud from which one who provides the means derives no benefit. Nowell v. Mayor of Monroe, 177 Ga. 648, 171 S.E. 136 (1933).

Conversion cases. — The principle stated in O.C.G.A. § 23-1-14 is applicable in conversion cases. Atlanta Classic Cars, Inc. v. Chih Hung USA Auto Corp., 209 Ga. App. 908, 439 S.E.2d 498 (1993).

When items stolen from an electric company were sold to a supply company, the electric company was not entitled to summary judgment on its conversion claim against the supply company and its principal because of the equitable doctrine codified at O.C.G.A. § 23-1-14, providing that, when one of two innocent persons must suffer by the act of a third person, the individual who put it in the power of the third person to inflict the injury shall bear the loss as there were genuine fact issues as to whether the principal was innocent and whether the electric company's inattentiveness allowed its employee to steal the items with impunity. Fed. Ins. Co. v. Westside Supply Co., 264 Ga. App. 240, 590 S.E.2d 224 (2003).

Liability of auctioneer for conversion. — The liability of an auctioneer for conversion does not extend to a case in which it is the true owner who originally enabled the auctioneer's principal to commit the underlying conversion and the auctioneer subsequently acts without knowledge of the principal's conversion. Benton v. Duvall Livestock Mktg., Inc., 201 Ga. App. 430, 411 S.E.2d 307 (1991).

This section does not apply when no fault or negligence is imputable to the party sought to be held thereby. Nowell v. Mayor of Monroe, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

Liability generally. — When one of two innocent persons must bear a loss, the one who occasioned it or one's representative cannot obtain affirmative relief in a court for the purpose of placing the loss upon the other party, who was equally innocent. Atlanta Banking & Sav. Co. v. Johnson, 179 Ga. 313, 175 S.E. 904 (1934).

When a loss must be suffered which results from the acts of one of two people, i.e., the act of the owner in delivering a stock power signed in blank, and the act of

General Consideration (Cont'd)

the corporate officers in accepting from the broker an unauthorized power, it must fall upon the one who first trusted the defaulting broker. Frye v. Commonwealth Inv. Co., 107 Ga. App. 739, 131 S.E.2d 569, aff'd, 219 Ga. 498, 134 S.E.2d 39 (1963).

As between one of two innocent parties who must suffer from a fraud of a third, one who furnished the means to commit the fraud, or whose negligence enables the third party to commit it, must bear the loss. McDonald v. Peoples Auto. Loan & Fin. Corp., 115 Ga. App. 483, 154 S.E.2d 886 (1967).

Application of equity when agents commit fraud. — Equity required that as between the lender and the companies, the companies had to bear the loss for any alleged fraud by their agents. R.W. Holdco, Inc. v. SCI/RW Holdco, Inc., 250 Ga. App. 414, 551 S.E.2d 826 (2001).

Liability when fraud committed. — By failing to file a lien, the pawnbroker enabled the automobile owners to perpetrate the fraud and must, therefore, bear the loss pursuant to this section. Cobb Ctr. Pawn & Jewelry Brokers, Inc. v. Gordon, 242 Ga. App. 73, 529 S.E.2d 138 (2000).

The law does not afford relief to one who suffers by not using the ordinary means of information that may be at hand, whether one's neglect be due to indifference or credulity. Braselton Bros. v. Better Maid Dairy Prods., Inc., 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

No legal duty by franchisor to consumer. — In a suit brought by a customer asserting conversion against an automobile franchisor and its financial company, the trial court properly granted summary judgment to the franchisor and the financial company as the business entities owned no legal duty to the consumer to prevent the franchisee from presenting an unreasonable risk of harm to the customer. As such, the customer could not predicate liability for conversion under O.C.G.A. § 23-1-14 as a matter of law. DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 668 S.E.2d 737 (2008).

Cited in Milner v. First Nat'l Bank, 38 Ga. App. 668, 145 S.E. 101 (1928); Moseley v. Phoenix Mut. Life Ins. Co., 167 Ga. 491, 145 S.E. 877 (1928); Anchor Duck Mills v. Harp, 40 Ga. App. 563, 150 S.E. 572 (1929); Skinner v. Stewart Plumbing Co., 42 Ga. App. 42, 155 S.E. 97 (1930); Lilly v. Citizens' Bank & Trust Co., 44 Ga. App. 653, 162 S.E. 639 (1932); Nowell v. Mayor of Monroe, 177 Ga. 648, 171 S.E. 136 (1933); Capital Auto. Co. v. Ward, 54 Ga. App. 873, 189 S.E. 713 (1936); Nightingale v. Juniata College, 186 Ga. 365, 197 S.E. 831 (1938); E. Frederics, Inc. v. Felton Beauty Supply Co., 58 Ga. App. 320, 198 S.E. 324 (1938); Peoples Bank v. Jones, 193 Ga. 720, 20 S.E.2d 74 (1942); Sterchi Bros. Stores v. Clark, 68 Ga. App. 259, 22 S.E.2d 740 (1942); Rose v. Crane Heating Co., 198 Ga. 295, 31 S.E.2d 717 (1944); Townsend v. Tattnall Bank, 76 Ga. App. 500, 46 S.E.2d 607 (1948); Berger v. Noble, 81 Ga. App. 34, 57 S.E.2d 844 (1950); Moore v. Bank of Dahlonega, 82 Ga. App. 142, 60 S.E.2d 507 (1950); Burgess v. Simmons, 207 Ga. 291, 61 S.E.2d 410 (1950); East Atlanta Bank v. Nicholson, 83 Ga. App. 557, 63 S.E.2d 699 (1951); Milner v. Ingram & Le Grand Lumber Co., 86 Ga. App. 543, 71 S.E.2d 786 (1952); Richards v. Dye, 89 Ga. App. 376, 79 S.E.2d 548 (1953); Cesaroni v. Savannah Bank & Trust Co., 90 Ga. App. 107, 82 S.E.2d 172 (1954); National Nu Grape Co. v. Citizens & S. Nat'l Bank, 94 Ga. App. 5, 93 S.E.2d 381 (1956); Pioneer Neon Supply Co. v. Johnson & Johnson Constr. Co., 95 Ga. App. 565, 98 S.E.2d 156 (1957); Dealers' Disct. Corp. v. Trammell, 98 Ga. App. 748, 106 S.E.2d 850 (1958); Weiss v. Johnson & Johnson Constr. Co., 98 Ga. App. 858, 107 S.E.2d 708 (1959); Birkett L. Williams Co. v. Smith, 353 F.2d 60 (5th Cir. 1965); Levy v. Empire Ins. Co., 379 F.2d 860 (5th Cir. 1967); Weiss v. Moody, 121 Ga. App. 682, 175 S.E.2d 82 (1970); International Harvester Credit Corp. v. Commercial Credit Equip. Corp., 125 Ga. App. 477, 188 S.E.2d 110 (1972); Mayor of Athens v. Gregory, 231 Ga. 710, 203 S.E.2d 507 (1974); Jackson's Atlanta Ready Mix Concrete Co. v. Industrial Tractor Parts Co., 139 Ga. App. 422, 228 S.E.2d 324 (1976); Georgia Ins. Agencies, Inc. v. Sentry Indem. Co., 152 Ga. App. 728, 263 S.E.2d 702 (1979); Palmer v. Forrest, Mackey & Assocs., 251 Ga. 304, 304 S.E.2d 704

(1983); Bank of Danielsville v. Seagraves, 167 Ga. App. 135, 305 S.E.2d 790 (1983); Lamb v. Thalimer Enters., Inc., 193 Ga. App. 70, 386 S.E.2d 912 (1989); Brinkley v. Bosch Olds-Buick-GMC, Inc., 199 Ga. App. 663, 405 S.E.2d 883 (1991); Northwest Carpets, Inc. v. First Nat'l Bank, 280 Ga. 535, 630 S.E.2d 407 (2006).

Fraud Generally

One of the essential elements of a cause of action for the common-law tort of deceit based upon fraud is the plaintiff's right to rely upon the representations. Braselton Bros. v. Better Maid Dairy Prods., Inc., 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

The master could be held liable for the servant's fraudulent presentation of invoices and receiving payment for more goods than were actually delivered by reason of having clothed the servant with apparent authority and upon the equitable principle contained in this section that as between two innocent persons that the master who put it in the power of the male-factor to inflict the loss should bear it. Lecroy v. Acme Meat Co., 125 Ga. App. 566, 188 S.E.2d 255 (1972).

Under ordinary conditions, in cases when a fraud has been committed by an agent, this rule (contained in this section) has been invoked against the agent's principal for the reason that the employer, by clothing the agent with apparent authority to act for the principal, has made the accomplishment of the fraud possible. But the doctrine applies with equal force against the defrauded third person when it appears the third party could have easily detected the deceit and neglected to do so for, under such circumstances, the third party's fault must be regarded as the proximate and efficient cause of the loss. Braselton Bros. v. Better Maid Dairy Prods., Inc., 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

A principal who puts a servant or other agent in a position which enables the agent while apparently acting within the agent's authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud. Braselton Bros. v. Better Maid Dairy Prods., Inc., 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

Misrepresentations are not actionable unless the plaintiff was justified in relying upon the misrepresentations in the exercise of common prudence and diligence. The misrepresentations must have been made under such circumstances that the injured party had a right to rely on the misrepresentations. Braselton Bros. v. Better Maid Dairy Prods., Inc., 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

A person who otherwise would be liable to another for the misrepresentations of one apparently acting for that person is not relieved from liability by the fact that the servant or agent acts entirely for one's own purposes, unless the other has notice of this. Braselton Bros. v. Better Maid Dairy Prods., Inc., 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

Equitable Estoppel

Application to sale of automobile. — When the owner of an automobile offers it for sale at an auction, and it is unconditionally delivered to such purchaser, the seller accepting a check for the purchase price, and such purchaser sells it for a valuable consideration to a third person who has no notice of the giving of the check, the title of the original owner is divested or the original owner is estopped from asserting it as against the innocent third-party purchaser although the check is unpaid and returned as worthless. Blount v. Bainbridge, 79 Ga. App. 99, 53 S.E.2d 122 (1949).

When the owner of an automobile voluntarily relinquished possession of it to a third person who gave him a worthless check, the owner is precluded from disputing, as against a bona fide purchaser, the existence of any title or power of sale, which through the original owner's own lack of caution, negligence or mistaken confidence, the original owner caused or allowed to appear to be vested in the third person with whom the innocent purchaser dealt. Equitable Credit & Disct. Co. v.

Equitable Estoppel (Cont'd)

Murray, 79 Ga. App. 795, 54 S.E.2d 650 (1949).

Application to agreement between spouses and innocent third party. — Wife's transfer and delivery of stock certificate to her husband operates to invest the husband with such external indicia of ownership that his pledge to an innocent lender is, on the principle of estoppel, binding upon her. The private understanding between a wife and her husband that she was merely lending the stock to him does not affect the right of the bank to hold the stock as security for a loan when the bank acted innocently and without knowledge of such agreement. Groover v. Savannah Bank & Trust Co., 186 Ga. 476, 198 S.E. 217 (1938).

Mistaken identity. — When the defendant loan company made check payable to name given by the person who made application for a loan, delivered the check to that person, and did not question the person's identity, the loan company and not the plaintiff who subsequently cashed the check for payee, knowing the payee by the name thereon, was responsible for the mistaken identity, if any, of the person to whom it issued and delivered the check. Peoples Loan & Sav. Co. v. Pardue, 56 Ga. App. 632, 193 S.E. 486 (1937).

Sales to innocent third parties. — Rule that when an owner has given to another such evidence of the right of selling the owner's goods as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of the owner's property, a sale to an innocent purchaser divests the true owner's title, is merely a special application of the rule embodied in this section that, "When one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury shall bear the loss." Cook Motor Co. v. Richardson, 103 Ga. App. 129, 118 S.E.2d 502 (1961).

Application to contractors. — In the general contractor's action against the materials provider relating to the provider's request for payment under a payment bond, the general contractor's claim that it was entitled, under equitable estoppel provided in O.C.G.A. § 23-1-14, to rely on the incorrect contract price stated in the provider's notice to the contractor failed; the provider's statutory notice to the contractor was not what put the subcontractor in a position to fail to complete its work or to fail in paying the provider for materials, which was the basis of the claim against the payment bond. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App. 377, 638 S.E.2d 815 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. 2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 146, 147.

ALR. — Propriety of suit in equity by or against several insurers under fire policies covering same risk, 98 A.L.R. 181.

Who must bear loss as between drawer induced by fraud of employee or agent to issue check payable to nonexisting person or a person having no interest in the proceeds thereof, and one who cashes or pays it on the forged endorsement by such employee or agent of the name of such ostensible payee, 99 A.L.R. 439.

Relative rights as between purchaser of chattel from one who had previously bought it with stolen money, and victim of the theft, 62 A.L.R.2d 537.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 A.L.R.2d 1180.

23-1-15. Where both parties equally at fault; where fault is unequal.

When both parties are equally at fault, equity will not interfere but will leave them where it finds them. The rule is otherwise if the fault of one decidedly overbalances that of the other.

History. — Orig. Code 1863, § 3026; Code 1868, § 3038; Code 1873, § 3093; Code 1882, § 3093; Civil Code 1895, § 3937; Civil Code 1910, § 4534; Code 1933, § 37-112.

Law reviews. — For note, the voluntary-payment doctrine in Georgia, see 16 Ga. L. Rev. 893 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
Equal Fault
Illustrative Cases

General Consideration

As a general rule, equity will not grant relief to a party who comes into court with unclean hands, or is guilty of an illegal or immoral act, nor aid a grantor or the grantor's administrator in seeking to cancel a security deed which was executed by the grantor for the purpose of hindering, delaying or defrauding creditors; these rules stem from the just and salutary principle that one will not be permitted to profit by one's own wrong, and apply when a party is seeking the aid of equity in the enforcement of executory contracts or its aid under an executed contract. Fuller v. Fuller, 211 Ga. 201, 84 S.E.2d 665 (1954).

When both parties are at fault. — O.C.G.A. § 23-1-15, states that when both parties are equally at fault, equity will not interfere but will leave them where it finds them. The rule is otherwise if the fault of one decidedly overbalances that of the other. Levine v. SunTrust Robinson Humphrey, 321 Ga. App. 268, 740 S.E.2d 672 (2013).

Cited in Felder v. Paulk, 165 Ga. 135, 139 S.E. 873 (1927); Nowell v. Mayor of Monroe, 177 Ga. 648, 171 S.E. 136 (1933); Harrell v. Fiveash, 182 Ga. 324, 185 S.E. 327 (1936); Turner v. Davidson, 183 Ga. 404, 188 S.E. 828 (1936); Roberts v. Roberts, 55 Ga. App. 456, 190 S.E. 442 (1937); Gibbs v. H.T. Henning Co., 189 Ga. 675, 7 S.E.2d 238 (1940); Townsend v. Tattnall Bank, 76 Ga. App. 500, 46 S.E.2d 607 (1948); Clifton v. Dunn, 208 Ga. 326, 66 S.E.2d 735 (1951); Pearl Optical, Inc. v. Pearle Optical of Ga., Inc., 218 Ga. 701, 130 S.E.2d 223 (1963); Oliver v. Forshee, 224 Ga. 200, 160 S.E.2d 828 (1968); Adams v. Smith, 129 Ga. App. 850, 201 S.E.2d 639 (1973); Daubresse v. Smithey, 231 Ga. 725, 204 S.E.2d 133 (1974); Griggs v. Griggs, 242 Ga. 96, 249 S.E.2d 566 (1978); Head v. Walker, 243 Ga. 108, 252 S.E.2d 440 (1979); Holmes v. Henderson, 274 Ga. 8, 549 S.E.2d 81 (2001).

Equal Fault

In fraudulent transactions equity leaves both parties just as it finds them. Harrell v. Fiveash, 182 Ga. 362, 185 S.E. 327 (1936).

If two parties engage in a fraudulent transfer and are in pari delicto, equity will leave the parties where it finds them. Laxton v. Laxton, 234 Ga. App. 221, 507 S.E.2d 146 (1998).

Equal fault rule not applicable when questions of fact present. — In a negligence and breach of trust action, because there were questions of fact about the relative fault of each party the equity maxim of when two parties are equally at fault, one may not recover from the other

Equal Fault (Cont'd)

did not apply. Levine v. SunTrust Robinson Humphrey, 321 Ga. App. 268, 740 S.E.2d 672 (2013).

Neither a court of law nor a court of equity will lend its aid to a party when it affirmatively appears that the plaintiff and defendant are in pari delicto. Nash v. Jones, 224 Ga. 372, 162 S.E.2d 392 (1968).

Illustrative Cases

Rule that equity refuses to interfere where both parties are at fault does not apply when the faults are unequal. Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 Ga. 105, 181 S.E. 822 (1935).

If the fault of one decidedly overbalances the other, equity may interfere. Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 Ga. 105, 181 S.E. 822 (1935).

No claim to nonjudicial foreclosure sale. — The son had no claim to the proceeds of a nonjudicial foreclosure sale conducted by his father when the son had executed a promissory note and deed to his father for the express purpose of delaying, hindering, or defrauding a potential judgment creditor, and thus had unclean hands, and the evidence showed that the proceeds did not exceed the amount of the promissory note, interest, advertising costs, and attorney fees. Laxton v. Laxton, 234 Ga. App. 221, 507 S.E.2d 146 (1998).

Transaction fraudulent at inception requires leaving parties where it finds them. — When transaction upon which suit was instituted was fraudulent in its inception, and petitioner's testator and the defendant were in pari delicto, equity will not interfere, but will leave the parties where it finds them. Roberts v. Roberts, 182 Ga. 568, 186 S.E. 192 (1936).

Two parties violating penal statutes. — When one is engaged with another in the simultaneous and willful violation of the same penal statute, one cannot recover damages for injuries inflicted upon that person through the negligence of one's joint wrongdoer unless the violation of the statute was not a contributing cause of the injuries; this is based upon the principle that the parties are in pari delicto, that what each does is the act of the other and that to permit a recovery under such circumstances would be in violation of public policy. Gaines v. Wolcott, 119 Ga. App. 313, 167 S.E.2d 366 (1969).

Enforcement of sham contracts. — An executed contract, such as an absolute conveyance purporting on its face to be a deed for the sale of land, though in fact a "mere sham" and made for the purpose of delaying or defrauding a creditor, is binding upon the maker, and one is estopped from impeaching it. Langan v. Langan, 224 Ga. 399, 162 S.E.2d 405 (1968).

Retention of fruits of unlawful transaction. — A husband who, in order to delay or defeat the collection of a claim for alimony or other lawful demands against him, conveyed land to another person and put that person in possession, could not maintain against the latter an action for the breach of a bond given by him to reconvey the land whenever so required. This is so, not because the law is disposed to aid one of the wrongdoers in retaining the fruits of the unlawful transaction, but because it denies the benefit of its remedies to the other. Langan v. Langan, 224 Ga. 399, 162 S.E.2d 405 (1968).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Equity, § 89.

ALR. — Illicit sexual relations between man and woman as affecting right of either to recover money paid or property transferred to other, 120 A.L.R. 475.

Right of partner or joint adventurer to accounting where firm business or transactions are illegal, 32 A.L.R.2d 1345.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 A.L.R.2d 1180.

Negligence in executing contract as af-

fecting right to have it reformed, 81 A.L.R.2d 7.

Right of action for injury to or death of woman who consented to illegal abortion, 36 A.L.R.3d 630.

23-1-16. Taking with notice of equity.

He who takes with notice of an equity takes subject to that equity.

History. — Orig. Code 1863, § 3024; Code 1868, § 3036; Code 1873, § 3091; Code 1882, § 3091; Civil Code 1895, § 3932; Civil Code 1910, § 4529; Code 1933, § 37-115.

JUDICIAL DECISIONS

Ordinarily proof of notice will avail nothing unless a party can couple such proof of notice with proof of a right, title, equity, claim or interest in the land in controversy. Hicks v. Smith, 205 Ga. 614, 54 S.E.2d 407 (1949).

When a successor tenant in common acquired the tenant's interest by deed of gift, the tenant took, not as a bona fide purchaser, but with notice of whatever equities the other original tenant in common had in the property. Bowers v. Bowers, 208 Ga. 85, 65 S.E.2d 153 (1951).

If after notice that one has made a contract to pass title to another to certain property, a third person cuts in, buys it, and takes a conveyance thereto, such person stands in the place of one's vendor, and a court of equity, if it would decree specific performance of the contract by one's vendor, will render a like decree against that one. Pace v. Pace, 220 Ga. 66, 137 S.E.2d 28 (1964).

Construction with O.C.G.A. § 23-6-64. — Findings entered by a special master, which determined that the disputed portion of an alley belonged to a landowner, and not the neighbors, by operation of the landowner's prior recorded deed, was not clearly erroneous, as: (1) the landowner received the property via a valid deed; (2) the neighbors failed to put the landowner on notice of their claim; and (3) the neighbors' claim of possession and use was insufficient. Cernonok v. Kane, 280 Ga. 272, 627 S.E.2d 14 (2006).

Notice of restrictive covenant. — Successor landowners were liable for breach of a restrictive covenant because, as buyers, they were charged with notice of the covenant in a recorded agreement, which required them to build a fence upon development of the property. Lesser v. Doughtie, 300 Ga. App. 805, 686 S.E.2d 416 (2009).

Genuine issue of fact as to inquiry notice of unrecorded deed. — Trial court erred by granting summary judgment to the plaintiff because the record showed that there was an issue of fact as to whether the defendants' possession of the property put the plaintiff on inquiry notice of the defendants' title despite the defendants' deed not being recorded. Caraway v. Spillers, 332 Ga. App. 588, 774 S.E.2d 162 (2015).

Restrictive covenants in deed enforceable in equity. — In a quiet title action commenced by a property purchaser, the restrictive covenants in a deed limiting the use of the land for a gas station were held enforceable in equity regardless of whether or not the burdens and benefits of the covenants ran with the land or were held in gross because it was undisputed that the purchaser had notice of them when it purchased the property. North Bay Avalon, LLLP v. Speedway, LLC, 340 Ga. App. 899, 797 S.E.2d 510 (2017).

Cited in Waynesboro Planing Mill v. Augusta Veneer Co., 35 Ga. App. 686, 134 S.E. 790 (1926); Voyles v. Carr, 173 Ga. 627, 160 S.E. 801 (1931); Carmichael Title Co. v. Yaarab Temple Bldg. Co., 177 Ga. 318, 170 S.E. 294 (1933); Toms v. Knighton, 199 Ga. 858, 36 S.E.2d 315 (1945); Shirling v. Hester, 201 Ga. 706, 40 S.E.2d 743 (1946); Smith v. Lanier, 202 Ga. 165, 42 S.E.2d 495 (1947); Stembridge

v. Smith, 213 Ga. 227, 98 S.E.2d 609 (1957); Dollar v. Dollar, 214 Ga. 499, 105 S.E.2d 736 (1958); Williamson v. Floyd County Wildlife Ass'n, 215 Ga. 789, 113 S.E.2d 626 (1960); Bacote v. Wyckoff, 251 Ga. 862, 310 S.E.2d 520 (1984); Southeast Toyota Distribs., Inc. v. Fellton, 212 Ga. App. 23, 440 S.E.2d 708 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 139, 167.

ALR. — Right of one who, with knowledge of outstanding equity, derived his interest in real property from or through a bona fide purchaser, to same protection as latter, 63 A.L.R. 1362.

Check given in land transaction as sufficient writing to satisfy statute of frauds, 9 A.L.R.4th 1009.

23-1-17. Scope of notice; ignorance due to negligence.

Notice sufficient to excite attention and put a party on inquiry shall be notice of everything to which it is afterwards found that such inquiry might have led. Ignorance of a fact due to negligence shall be equivalent to knowledge in fixing the rights of parties.

History. — Civil Code 1895, § 3933; Civil Code 1910, § 4530; Code 1933, § 37-116.

History of Code section. — This Code section is derived from the decisions in Hunt v. Dunn, 74 Ga. 120 (1884) and Schmidt v. Block, 76 Ga. 823 (1886).

Law reviews. — For article, "A Comprehensive Analysis of Georgia RICO," see 9 Ga. St. U.L. Rev. 537 (1993). For article, "Noticing the Bankruptcy Sale: The Purchased Property May Not Be as 'Free and Clear of All Liens, Claims and Encumberances' as You Think," see 15 (No. 5) Ga. St. B.J. 12 (2010). For article, "Eleventh Circuit Survey: January 1, 2013 — December 31, 2013: Casenote: The Decline and Fall of Constructive Notice," see 65 Mercer L. Rev. 1203 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration
Scope of Notice
Negligence

General Consideration

Application of section to waiver clause in contracts of insurance. — The provisions of this section have no application to the subject of waiver, as related to conditions imposing forfeitures in contracts of insurance. Prudential Ins. Co. of Am. v. Perry, 121 Ga. App. 618, 174 S.E.2d 570 (1970); Shield Ins. Co. v. Kitt, 143 Ga. App. 48, 237 S.E.2d 515 (1977), rev'd on other grounds, 240 Ga. 619, 241 S.E.2d 824 (1978).

Actual notice. — Actual notice is shown, when the proof, positive or presumptive, authorizes the clear and satisfactory conclusion, that the purchaser had knowledge of the incumbrance, or would have had knowledge if the purchaser had not willfully declined to search for it, and thus the purchaser's conscience is affected by it; and constructive notice, is that which arises out of a legal inference, or presumption strictly speaking, such as notice from a register, record, or some such matter; and which does not affect the conscience of the purchaser because, notwithstanding the legal presumption, the purchaser may never have had absolute knowledge of the record or been put upon inquiry in relation to it. Citizens & S.

Bank v. Morris State Bldg. Corp., 243 Ga. 169, 253 S.E.2d 89 (1979).

Existence of notice determined by jury. — The question as to whether the defendant had actual notice, or as to whether the circumstances were sufficient to put the defendant on notice of the state of the title to certain property were questions to be determined by the jury. Dollar v. Dollar, 214 Ga. 499, 105 S.E.2d 736 (1958).

General reputation is not notice of fact. — While general reputation or notoriety of a proven fact may be admissible in evidence, to be considered by the jury, with other evidence, on the question of notice of such fact, such reputation or notoriety in the community is not itself notice of the fact. Roebuck v. Payne, 109 Ga. App. 525, 136 S.E.2d 399 (1964).

Construction with O.C.G.A. § 23-6-64. — Findings entered by a special master, which determined that the disputed portion of an alley belonged to a landowner, and not the neighbors, by operation of the landowner's prior recorded deed, was not clearly erroneous, as: (1) the landowner received the property via a valid deed; (2) the neighbors failed to put the landowner on notice of their claim; and (3) the neighbors' claim of possession and use was insufficient. Cernonok v. Kane, 280 Ga. 272, 627 S.E.2d 14 (2006).

Inquiry notice based on possession. — Trial court erred by granting summary judgment to the plaintiff because the record showed that there was an issue of fact as to whether the defendants' possession of the property put the plaintiff on inquiry notice of the defendants' title despite the defendants' deed not being recorded. Caraway v. Spillers, 332 Ga. App. 588, 774 S.E.2d 162 (2015).

Cited in North Ga. Trust & Banking Co. v. Hulme, 35 Ga. App. 627, 134 S.E. 200 (1926); Planing Mill v. Augusta Veneer Co., 35 Ga. App. 686, 134 S.E. 790 (1926); Darden v. Washington, 35 Ga. App. 777, 134 S.E. 813 (1926); Fender v. Hodges, 38 Ga. App. 78, 142 S.E. 753 (1928); Todd v. Lewis, 169 Ga. 1, 149 S.E. 562 (1929); Mathis v. Mathis, 42 Ga. App. 1, 155 S.E. 88 (1930); Investor's Syndicate v. Thompson, 172 Ga. 203, 158 S.E. 20 (1931); United Eng'rs & Constructors, Inc. v. Fiat Metal Mfg. Co., 175 Ga. 509, 165 S.E. 609 (1932); Georgia R.R. Bank & Trust Co. v. Liberty Nat'l Bank & Trust Co., 180 Ga. 4, 177 S.E. 803 (1934); Shaw v. National Life Ins. Co., 51 Ga. App. 794, 181 S.E. 872 (1935); Fite v. Walker, 183 Ga. 46, 187 S.E. 95 (1936); H.C. Witmer Co. v. Petty, 54 Ga. App. 377, 187 S.E. 908 (1936); Rowe v. Cole, 183 Ga. 477, 188 S.E. 668 (1936); Heath v. Davis, 184 Ga. 704, 192 S.E. 727 (1937); Mutual Benefit Health & Accident Ass'n v. Hulme, 57 Ga. App. 876, 197 S.E. 85 (1938); Groover v. Savannah Bank & Trust Co., 186 Ga. 476, 198 S.E. 217 (1938); Georgia State Sav. Ass'n v. Wilson, 189 Ga. 21, 5 S.E.2d 14 (1939); Lewis v. Patterson, 191 Ga. 348, 12 S.E.2d 593 (1940); Federal Land Bank v. Drake, 64 Ga. App. 684, 14 S.E.2d 178 (1941); Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942); Joel v. Publix-Lucas Theater, Inc., 193 Ga. 531, 19 S.E.2d 730 (1942); Hall v. Turner, 198 Ga. 763, 32 S.E.2d 829 (1945); Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895 (1945); Wren v. Wren, 199 Ga. 851, 36 S.E.2d 77 (1945); Toms v. Knighton, 199 Ga. 858, 36 S.E.2d 315 (1945); Kilby v. Sawtell, 203 Ga. 256, 46 S.E.2d 117 (1948); Adler v. Adler Co., 205 Ga. 818, 55 S.E.2d 13 (1949); Ogletree v. West Lumber Co., 208 Ga. 43, 64 S.E.2d 894 (1951); United States v. West, 132 F. Supp. 934 (N.D. Ga. 1955); Exchange Ins. Ass'n v. Mathews, 93 Ga. App. 470, 92 S.E.2d 121 (1956); Ballentine Motors of Ga., Inc. v. Nimmons, 93 Ga. App. 708, 92 S.E.2d 714 (1956); Peoples Loan & Fin. Corp. v. Halbeisen Motors Co., 271 F.2d 538 (5th Cir. 1959); Dixie Belle Mills, Inc. v. Specialty Mach. Co., 217 Ga. 104, 120 S.E.2d 771 (1961); Frye v. Commonwealth Inv. Co., 107 Ga. App. 739, 131 S.E.2d 569 (1963); Cohen v. Gotlieb, 108 Ga. App. 122, 132 S.E.2d 93 (1963); Kamlapat v. Purvis-Wade Carpet Mills, 112 Ga. App. 781, 146 S.E.2d 138 (1965); D.H. Overmyer Co. v. Joe Summers Roofing Co., 120 Ga. App. 188, 169 S.E.2d 821 (1969); Buffalo Ins. Co. v. Star Photo Finishing Co., 120 Ga. App. 697, 172 S.E.2d 159 (1969); Robinson v. Transcontinental Gas Pipe Line Corp., 306 F. Supp. 201 (N.D. Ga. 1969); Hodges v. Youmans, 122 Ga. App. 487, 177 S.E.2d 577 (1970); Goldman v. Hart, 134 Ga. App. 422, 214

General Consideration (Cont'd)

S.E.2d 670 (1975); Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976); Crymes v. Ryland Group, Inc., 143 Ga. App. 436, 238 S.E.2d 764 (1977); Bohannon v. Manhattan Life Ins. Co., 555 F.2d 1205 (5th Cir. 1977); Gulden v. Newberry Wrecker Serv., Inc., 154 Ga. App. 130, 267 S.E.2d 763 (1980); Palmetto Capital Corp. v. Smith, 284 Ga. App. 819, 645 S.E.2d 9 (2007); Wells Fargo Bank, N.A. v. Gordon, 292 Ga. 474, 749 S.E.2d 368 (2013).

Scope of Notice

Effect of notice sufficient to excite attention. — Whatever is notice enough to excite attention and put the party on guard and call for inquiry is also notice of everything to which it is afterwards found that such inquiry might have led, although all was unknown for want of investigation; that is, when a person has sufficient information to lead the person to a fact, the person shall be deemed cognizant of the fact. Southern Ry. v. Watson, 74 Ga. App. 317, 39 S.E.2d 707 (1946).

Failure to take any action with respect to notice sufficient to excite inquiry justifies a presumption against the existence or validity of the right which one later seeks to assert, or justifies the presumption that if one ever possessed such a right it has been abandoned or waived or has been satisfied. Cohen v. Glass, 225 Ga. 646, 171 S.E.2d 118 (1969).

Judicial testimony serving as notice. — When defendant loan association had notice of the plaintiff's equity in the land at and before the time the association took its security deed from another person, such security deed was subject to cancellation as between the plaintiff and the association, whether or not it might still be treated as valid against the grantor to the extent of the latter's interest. Fulmore v. Macon Fed. Savs. & Loan Ass'n, 191 Ga. 151, 11 S.E.2d 790 (1940).

A purchaser, having knowledge such as would lead a reasonable man to make inquiries which would disclose facts sufficient to bar the rights of the grantor, is also personally barred. Hendrix v. W.R. Altman Lumber Co., 145 F.2d 501 (5th Cir. 1944).

When the plaintiff contended that the defendant had actual notice of the plaintiff's claim of equitable title to the property because of testimony of the plaintiff delivered in the defendant's presence in the court of ordinary (now probate court), the rule announced by this section that one having only such notice as would excite attention and put one on inquiry would be chargeable with notice of everything to which such inquiry might have led, was not directly involved, and if a charge of this principle was desired, a written request therefor should have been made. Dollar v. Dollar, 214 Ga. 499, 105 S.E.2d 736 (1958).

Inquiry notice of government officials. — When a clerk sought to renew the clerk's bond in a manner not recognized by law, this irregularity alone was sufficient to put the mayor and council on inquiry and to affect them with constructive knowledge of every condition and circumstance which a proper inquiry would have disclosed, including the fact that the only contract actually proposed by the company was one which should embrace the terms of the continuation certificate. Nowell v. Mayor of Monroe, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

A municipality is charged, as a matter of law, with notice that a clerk and treasurer as agent of a fidelity company cannot consummate a valid contract in the nature of an official bond without a writing signed by the company. Nowell v. Mayor of Monroe, 177 Ga. 648, 171 S.E. 136 (1933).

Judicial statement as notice. — Whether a judge's statement is intended merely as a finding on an issue of fact or as a ruling that under the evidence the party was charged with knowledge as a matter of law; the evidence may be sufficient to authorize a finding of notice. Alropa Corp. v. Snyder, 182 Ga. 305, 185 S.E. 352 (1936).

Party's duty with respect to jury and giving notice. — When parties are furnished with a list of the jury, it is their duty, if they know that any of the jurors are disqualified, to call attention to the

disqualification, or the disqualification will be held to have been waived; if they have reasonable grounds to suspect that any of the jurors are disqualified, it is their duty to call attention to the fact, so that due inquiry may be made of the panel. Kennedy v. State, 191 Ga. 22, 11 S.E.2d 179 (1940).

The court did not err in overruling ground of motion for new trial based on alleged disqualification of juror whose mind, it was claimed, was not perfectly impartial between the state and the accused, when on consideration of the evidence introduced by the defendant and the state in reference to this ground, the judge was authorized to find that the juror was not disqualified as contended. Kennedy v. State, 191 Ga. 22, 11 S.E.2d 179 (1940).

Lease between a debtor and a county, which was recorded in county records, was properly attested, and contained a full legal description of real property, and which referred to a trust indenture 27 times, provided constructive notice to a bona fide purchaser of the unrecorded indenture and the mortgage lien it created and gave rise to a duty to inquire further, which would have led to discovery of the unrecorded lien. Thus, because the mortgage lien was enforceable against a bona fide purchaser under Georgia law, it was not avoidable by a Chapter 11 trustee or a debtor in possession. Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119 (Bankr. N.D. Ga. 2013).

Effect of unattested signature. — Trustee could not avoid a creditor's security interests under 11 U.S.C. § 544 because a security deed provided constructive notice of the creditor's interest in the properties despite the fact that the nondebtor wife's signature was not attested in compliance with Georgia law. MacArthur v. Am. Gen. Fin. Servs. (In re MacArthur), 430 B.R. 300 (Bankr. N.D. Ga. 2010).

When the vendor of an interest in real property is in prison the vendee is put on notice of the lien for costs, or notice of a fact which, if diligently investigated, would have disclosed the lien. Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942).

A recorded deed, in order to operate as a constructive notice to a bona fide purchaser of land, must be a link in the purchaser's chain of title. Real Estate Operators, Inc. v. McMahon, 171 Ga. 454, 155 S.E. 755 (1930).

The proper recording of a security deed is notice to the entire world of its lien from that date and such notice continues until it is properly canceled of record. Rossville Fed. Sav. & Loan Ass'n v. Chase Manhattan Bank, 223 Ga. 188, 154 S.E.2d 243 (1967).

One claiming title to lands is chargeable with notice of every matter which appears in one's deed, and of any matters which appear on the face of any deed, decree, or other instrument forming an essential link in the chain of instruments through which one deraigns title, and of whatever matters one would have learned by any inquiry which the recitals of those instruments made it one's duty to pursue. Henson v. Bridges, 218 Ga. 6, 126 S.E.2d 226 (1962).

Notice in real estate transactions. — When an inquiry made by the prospective purchaser of defendant, or an examination by the defendant of the public records of the county, would have resulted in the discovery of unpaid retention of title contract, this is sufficient notice. Shippen v. Georgia Power Co., 172 Ga. 913, 159 S.E. 268 (1931).

When the security deed was accepted after being expressly told by the petitioner of the petitioner's equitable interest in the land (as to which there was evidence though conflicting), the fact that the records were fully examined and did not disclose any such equitable interest, but did disclose the legal title of the grantor in the security deed, would not excuse failure of the grantee in the security deed to make inquiry of the petitioner as to the facts upon which the petitioner based the petitioner's claim of interest. Bell v. Bell, 178 Ga. 225, 172 S.E. 566 (1934).

The possession of the tenant being the possession of the landlord, and the landlord having apparently executed an absolute deed conveying to another, and that deed being recorded, purchaser would be authorized to assume that, as a matter of law, the possession of the tenant was held

Scope of Notice (Cont'd)

under the grantee, and not adversely to the latter's title. Chestnut v. Weekes, 180 Ga. 701, 180 S.E. 716 (1935).

The continued possession of a grantor who executes an absolute deed demands that one who purchases from the grantee inquire into the right of the grantee's occupancy. Chandler v. Georgia Chem. Works, 182 Ga. 419, 185 S.E. 787 (1936).

A purchaser who was informed by reservation in the purchaser's deed of the existence of a contract for the removal of timber from that land, was chargeable with notice of the terms of such contract. Hendrix v. W.R. Altman Lumber Co., 145 F.2d 501 (5th Cir. 1944).

That a recorded security deed from a grantor to the grantee contained an incorrect land lot designation did not mean that a mortgagee of the property was not on notice of the deed under O.C.G.A. § 44-2-2(b) because the incorporation of the subdivision plat in the deed provided a key to locating the property. Therefore, the grantee's deed was valid. Deljoo v. SunTrust Mortg., Inc., 284 Ga. 438, 668 S.E.2d 245 (2008).

Constructive and inquiry notice. — Purchasers of land are charged with constructive notice of recorded instruments and the concept of inquiry notice. For a discussion of the balance between these concepts, see Stearns Bank, N.A. v. Rent-A-Tent, Inc. (In re Rent A Tent, Inc.), 468 B.R. 442 (Bankr. N.D. Ga. 2012).

Validation order issued by a superior court authorizing a county to incur indebtedness did not give notice to a purchaser of the existence of a trust indenture or any interest of a bond trustee in real property as a matter of constructive or inquiry notice as a title examiner did not have to investigate pleadings and orders in litigation in which the seller of property was a party. Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119 (Bankr. N.D. Ga. 2013).

Even though recorded, an unsigned security deed did not provide constructive notice to a bona fide purchaser under O.C.G.A. §§ 44-5-30 and 44-14-33 as in effect in 2014 when the security deed was recorded. However, the security deed referenced and incorporated a waiver, which was properly executed and attested, and the waiver referenced and incorporated the security deed and, thus, the security deed and waiver were effective under Georgia law to provide inquiry notice to a subsequent purchaser and, accordingly, the trustee could not avoid the defendant's interest because the trustee did not qualify as a bona fide purchaser of real property. Kelley v. USAA Fed. Sav. Bank (In re Jones), 580 B.R. 916 (Bankr. M.D. Ga. 2017).

Chapter 7 trustee, as a bona fide purchaser for value, could not take the property at issue free of the creditor's security deed as to the debtor wife's interest in the property because the recording of the security deed provided constructive notice to the trustee of the creditor's interest in the property. Pettie v. RBC Mortg. Co. (In re Jackson), No. 18-5064-BEM, 2019 Bankr. LEXIS 2883 (Bankr. N.D. Ga. Sept. 17, 2019).

Knowledge chargeable to a party after the party is put on inquiry is not limited to such knowledge only as would be gained by an examination of the public records. Dyal v. McLean, 188 Ga. 229, 3 S.E.2d 571 (1939); Collins v. Freeman, 226 Ga. 610, 176 S.E.2d 704 (1970).

Inquiry notice. — When a Chapter 7 debtor purchased a home and paid off a bank's existing security interest with funds borrowed from a creditor, the creditor's security deeds, which were recorded along with the debtor's warranty deed several weeks after the closing of the home purchase and the creditor's loan, were perfected at the time they were executed and delivered within the meaning of 11 U.S.C. § 547(e)(1)(A) because a bona fide purchaser would have had inquiry notice of them at all times prior to their recordation based on the debtor's absence of record title and the existence of the cancelled security deed on the property in favor of the bank. Watts v. Argent Mortg. Co., LLC (In re Hunt), No. 04-77191-PWB, 2007 Bankr. LEXIS 1020 (Bankr. N.D. Ga. Feb. 23, 2007).

When a Chapter 7 trustee sought to avoid two security deeds the debtor gave to a mortgage company on the ground that the security interests were made within

90 days of the filing of the debtor's bankruptcy case and were therefore avoidable under 11 U.S.C. § 547(b)(4)(A), the trustee failed. The mortgage company's security deeds were perfected from July 14, 2004, the date a hypothetical bona fide purchaser would have had such notice, as set forth in O.C.G.A. § 23-1-17, and the date of perfection was within 10 days of the date of the transfer of property; accordingly, the transfer was made before the 90-day reachback period commenced on July 20, 2004, and the trustee could not avoid the deeds. Watts v. Argent Mortg. Co., LLC (In re Hunt), No. 07-14615, 2008 U.S. App. LEXIS 25653 (11th Cir. Dec. 18, 2008) (Unpublished).

Sufficient notice of airport easement. — Owner of property adjacent to a bankruptcy debtor's private airport had an express easement to use the airport, even though the easement was not recorded until after the debtor purchased the airport, since the debtor had sufficient notice of the easement through visible indications such as taxiways, roads, and the owner's use of the airport. Flyboy Aviation Props., LLC v. Franck, 501 B.R. 808 (Bankr. N.D. Ga. 2013).

Fixture filing contained sufficient information to put purchaser on notice. — Under Georgia law, a fixture filing contained sufficient information to put a purchaser on notice of the existence of a bond trustee's prior unrecorded interest in the real property under an indenture, and the references in the fixture filing to the assignment and pledge of the debtor's interest would excite the attention of a purchaser and trigger the duty to inquire further into the interest held by the bond trustee. That inquiry would include an examination of the indenture that would give the purchaser notice of the bond trustee's mortgage and, thus, the mortgage lien was enforceable against a bona fide purchaser, and the mortgage lien was not avoidable under the Bankruptcy Code. Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119 (Bankr. N.D. Ga. 2013).

No duty to inquire arose. — In a declaratory judgment action brought by the purchasers of certain real property to remove a cloud from the purchasers' title asserted by a bank who had obtained a writ of fieri facias (the lien) against one of the sellers, the trial court erred by granting summary judgment to the bank and holding that the purchasers had a duty to inquire as to prior names used by that seller. The purchasers provided expert testimony that the lien using that seller's married name had not been recorded and, in turn, the bank failed to present any evidence to dispute the affidavits of the purchasers' witnesses or to cite to any authority which imposed a duty on the purchasers or the purchasers' agents to investigate prior or alternative names of that seller when nothing occurred prior to or during the closing that created a duty to inquire and that seller had falsely sworn under oath that the property was not subject to any encumbrances or liens and that there were no outstanding judgments. Gallagher v. Buckhead Cmty. Bank, 299 Ga. App. 622, 683 S.E.2d 50 (2009), cert. denied, No. S09C2080, 2010 Ga. LEXIS 2 (Ga. 2010).

Trustee not on inquiry notice. — Chapter 7 trustee was a bona fide purchaser for value as of the petition date under Georgia law as no security deed was of record in the debtors' chain of title and there was nothing in the record to put the trustee on inquiry notice of the existence of a bank's unrecorded security deed and, thus, the trustee could avoid the bank's security deed under 11 U.S.C. § 544(a)(3) and recover the property for the benefit of the estate under 11 U.S.C. § 550. The court rejected the bank's argument that the bank should be equitably subrogated to the rights of a prior lender whose loan was satisfied by the bank's loan because even if the bank was correct, a subrogee could have no greater rights than the party to whose rights it was subrogated, and the lender cancelled the lender's security deed prior to the petition date so that any subrogated rights of the bank were terminated at the same time. Ogiers v. Wells Fargo Bank, N.A. (In re Phillips), 465 B.R. 336 (Bankr. N.D. Ga. 2012).

Knowledge of county's ownership insufficient for inquiry. — Although a county failed to comply with O.C.G.A. § 36-9-2 by recording a transfer in the minutes when the county conveyed the

Scope of Notice (Cont'd)

county's interest in property the county had formerly acquired by eminent domain to the county development authority, a subsequent purchaser was a bona fide purchaser without notice of this irregularity under O.C.G.A. § 23-1-20. Knowledge of the county's ownership was insufficient to excite inquiry. Darling Int'l, Inc. v. Carter, 294 Ga. 455, 754 S.E.2d 347 (2014).

Affidavit not part of property's chain of title. — With respect to the issue of whether a Chapter 7 trustee was a bona fide purchaser under 11 U.S.C. § 544 of the debtor husband's interest, the fact that a corrective deed was cross-indexed with a special warranty deed did not pull the corrective deed into the property's chain of title. A bank's analogy to recordable affidavits under Georgia law was inapposite because, setting aside that the statute applied specifically to affidavits containing particular information, nothing in that statute stated that cross-indexing a recordable affidavit made the affidavit part of a property's chain of title. Bank of Am., N.A. v. Adams (In re Adams), 583 B.R. 541 (Bankr. N.D. Ga. 2018).

Genuine issue of fact as to inquiry notice of unrecorded deed. — Trial court erred by granting summary judgment to the plaintiff because the record showed that there was an issue of fact as to whether the defendants' possession of the property put the plaintiff on inquiry notice of the defendants' title despite the defendants' deed not being recorded. Caraway v. Spillers, 332 Ga. App. 588, 774 S.E.2d 162 (2015).

Notice of need to confirm guardian's authority to convey children's interest. — Trial court did not err in denying purchasers and the holders of two outstanding security deeds bona fide purchaser status because a quitclaim deed showed on the deed's face that a parent signed the deed as the children's purported "guardian"; thus, the designation of a "guardian" in the chain of title put the purchasers and holders on notice of the need to confirm the parent's legal authority to convey the children's interest in the property. Chase Manhattan Mortg. Corp. v. Shelton, 290 Ga. 544, 722 S.E.2d 743 (2012).

Knowledge chargeable to a party, after the party is put on notice, extends to such knowledge as diligent inquiry would have disclosed. Howell v. United States, 519 F. Supp. 298 (N.D. Ga. 1981).

Once prospective purchaser of property finds person in actual, open, visible, exclusive, and unambiguous possession of the property, one has an affirmative duty to inquire of the possessor concerning one's rights in the premises and as a consequence of one's failure to do so, one may not prevail as a purchaser for value without notice. Bacote v. Wyckoff, 251 Ga. 862, 310 S.E.2d 520 (1984).

Chapter 7 trustee was not entitled to sell a debtor's property because the trustee was not a bona fide purchaser without notice; an examination of the deed book and page numbers used in transfers and assignments would have alerted a hypothetical purchaser to the uncertainty concerning the status of both assignees' interest in the property. The trustee's powers under 11 U.S.C. § 544(a)(3) did not cut off the first assignee's rights to seek reformation of the mistakenly cancelled first deed because the second assignee's quitclaim release of the instrument assigned to the first assignee was sufficient to constitute notice that would excite attention and put a party on inquiry under O.C.G.A. § 23-1-17. Household Fin. Servs. v. Neighbors (In re Neighbors), No. 06-6008, 2006 Bankr. LEXIS 4653 (Bankr. S.D. Ga. Oct. 11, 2006).

Negligence

Equity requires diligence, and will not do for one that which one could have done personally but for one's own negligence. Glens Falls Indem. Co. v. Liberty Mut. Ins. Co., 202 Ga. App. 752, 44 S.E.2d 543 (1947).

An equitable action to cancel a deed on the ground of fraud, which clearly shows that the complainant failed to use even slight diligence to discover the fraud, fails to allege a cause of action. Equity will not grant relief to one whose long delay ren-

ders the ascertainment of the truth difficult, though no legal limitation bars the action. Whitfield v. Whitfield, 204 Ga. 64, 48 S.E.2d 852 (1948).

When a creditor did not exercise diligence before the creditor accepted a warranty deed in satisfaction of the creditor's debt, the creditor was chargeable with the knowledge that timber had been cut from the land. Westbrook v. Beusse, 79 Ga. App. 654, 54 S.E.2d 693 (1949).

If by negligence one voluntarily remains ignorant of a fact materially affecting one's interest and subsequently loses a right or property, one should not expect equity to do that for one which one refuses to do for oneself. Cohen v. Glass, 225 Ga. 646, 171 S.E.2d 118 (1969).

Negligent ignorance is equivalent to knowledge. Southern Ry. v. Watson, 74 Ga. App. 317, 39 S.E.2d 707 (1946).

Equity will not relieve a person from the person's erroneous acts or omissions resulting from the person's own negligence. Mangham v. Hotel & Restaurant Supply Co., 107 Ga. App. 619, 131 S.E.2d 74 (1963).

In the sale of real estate and when there are no confidential relations alleged, the law will not protect a party in the party's own negligence. Westbrook v. Beusse, 79 Ga. App. 654, 54 S.E.2d 693 (1949).

When a purchaser has knowledge of any fact sufficient to put a prudent man upon an inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that one is about to purchase, it is one's duty to make the inquiry; and, if one does not make it, he is guilty of bad faith or negligence to such extent that the law will presume that one made it, and will charge one with the actual notice one would have received if one had made it. Commodity Credit Corp. v. Wells, 188 Ga. 287, 3 S.E.2d 642 (1939).

The fact that the attorneys for the purchaser, and therefore the purchaser, have actual knowledge of the pendency of a suit for a money judgment in a tort action will not charge them with notice of the rendition of a judgment in that case, when no execution had been issued and recorded as provided by the statute, and they will not be chargeable with negligence, and therefore with notice, because they did not examine the papers in the suit, examine the bar docket, examine the minutes of the court, or make inquiry of plaintiff's counsel in that case, for: "What the law requires … to put innocent third parties upon notice of the existence of a judgment lien is an entry of the execution upon a certain record in the office of the clerk of the superior court. Where there is a failure to make such record, third parties are not charged with any duty to make an investigation or inquiry in relation to the existence of such a lien against their vendor." Jackson v. Faver, 210 Ga. 58, 77 S.E.2d 728 (1953).

When two contracting parties deal at arms length with one another, and a written instrument is entered into and signed, and there is no evidence of artifice or fraud, and each party had ample opportunity to inform oneself as to the amounts claimed due, and a party negligently omitted to take such precautions as would reasonably serve to protect oneself, the defense of mistake of fact, if there is one — is obviously caused by the party's own neglect and is not available as a defense. Berry v. Atlas Metals, Inc., 152 Ga. App. 437, 263 S.E.2d 179 (1979).

Company with knowledge of deficiency of employee. — Once a cab company had knowledge that the diagnosis of a physician showed a cab operator-employee was subject to recurring loss of consciousness which rendered it dangerous for the operator to drive, mere failure of the cab company to ascertain whether or not the operator had made a recovery would fall under the head of "negligent ignorance" which would be insufficient to relieve the company from liability for the unfortunate consequences following a seizure while the defendant was operating the taxicab. Jackson v. Co-op Cab Co., 102 Ga. App. 688, 117 S.E.2d 627 (1960).

Negligence in not discovering defect in title. — Notice which would charge a purchaser of personal property with negligence in not discovering a defect in the vendor's title, which the vendor impliedly warranted in the sale, is not the constructive notice derived from the record in the clerk's office as required by law

Negligence (Cont'd)

of instruments affecting the title to property, before a purchaser can be charged with negligence in failing to discover a defect in the vendor's title to the property sold, the purchaser must have had actual notice of the defect, or notice of a fact sufficient to put the purchaser upon inquiry as to the state of the title to the property. Perrin v. Reardon, 44 Ga. App. 823, 163 S.E. 300 (1932).

The failure of a petitioner to know the content defining the coverage of its insurance contract or to compare the facts and circumstances surrounding the injury to ascertain if it was covered thereby, and its failure to inquire of the employer or the industrial board (Board of Worker's Compensation) as to the existence of an insurance contract with another insurance carrier that covered the injury, amounted to negligence on the part of the petitioner, and would not constitute such a mistake of fact as would render the agreement and the payments thereunder involuntary and, therefore, a basis for subrogation. Glens Falls Indem. Co. v. Liberty Mut. Ins. Co., 202 Ga. 752, 44 S.E.2d 543 (1947).

Subrogation for voluntary payments is not allowed. Subrogation will be allowed, (1) when there are existing circumstances which in equity amount to an implied agreement for subrogation; or (2) when there is an agreement with either the debtor or the creditor whereby one making the payment will be subrogated to the rights and remedies of the original creditor. Glens Falls Indem. Co. v. Liberty Mut. Ins. Co., 202 Ga. App. 752, 44 S.E.2d 543 (1947).

One failing to inform oneself, but having equal opportunity of learning the truth, must suffer the consequences of one's neglect. Rustin Stamp & Coin Shop, Inc. v. Ray Bros. Roofing & Sheet Metal Co., 175 Ga. App. 30, 332 S.E.2d 341 (1985).

Negligence of purchaser of real estate. — When the purchaser was under constructive notice as to the legal description of one's own deed, which incorporated the recorded plat by reference, and as to the ownership of the lot one believed one was buying but that was owned by another, one's failure to conduct a title examination was the sole proximate cause of injuries and one's negligence action was barred. Reidling v. Holcomb, 225 Ga. App. 229, 483 S.E.2d 624 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 145, 167.

C.J.S. — 37 C.J.S., Fraud, § 28 et seq.

ALR. — Possession of land by cotenant after acquisition of interest of another cotenant as notice to subsequent purchaser from or creditor of latter, 162 A.L.R. 209.

What constitutes notice to subsequent purchaser of real property of option to purchase contained in unrecorded lease, 17 A.L.R.2d 331.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 A.L.R.2d 1180.

Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor, 82 A.L.R.3d 1040.

23-1-18. Pending action as notice; effect on purchaser.

Decrees ordinarily bind only parties and their privies; but a pending action shall be a general notice of an equity or claim to all the world from the time the action is filed and docketed. If the same is duly prosecuted and is not collusive, one who purchases pending the final outcome of the litigation shall be affected by the decree rendered therein.

History. — Civil Code 1895, § 3936; Civil Code 1910, § 4533; Code 1933, § 37-117.

History of Code section. — This Code section is derived from the decisions in Carmichael v. Foster, 69 Ga. 372 (1882), Wilson v. Wright, 72 Ga. 848 (1884), and Weems v. Harrold, Johnson & Co., 75 Ga. 866 (1885).

JUDICIAL DECISIONS

Analysis

General Consideration
Doctrine of Lis Pendens
1. In General
2. Application of Doctrine

General Consideration

O.C.G.A. § 23-1-18 did not apply to an action in which purchasers of a farm sued their vendor's former partner to recover horses that the former partner was awarded in a lawsuit against the vendor and which the former partner obtained as the result of a levy on the judgment. Russell v. Lawrence, 234 Ga. App. 612, 507 S.E.2d 161 (1998).

Cited in Bennett v. Stokey, 164 Ga. 694, 139 S.E. 346 (1927); Plainville Brick Co. v. Williams, 170 Ga. 75, 152 S.E.2d 85 (1930); Jackson v. Massachusetts Mut. Life Ins. Co., 183 Ga. 659, 189 S.E. 243 (1936); A.B. Farquhar Co. v. Myers, 194 Ga. 220, 21 S.E.2d 432 (1942); Foster v. Rowland, 194 Ga. 845, 22 S.E.2d 777 (1942); Fleminster v. Billups, 202 Ga. 132, 42 S.E.2d 376 (1947); Wilson v. Blake Perry Realty Co., 219 Ga. 57, 131 S.E.2d 555 (1963).

Doctrine of Lis Pendens

1. In General

Purpose of doctrine of lis pendens. — Lis pendens, whether it be from the common law as provided in former Code 1933, § 37-117 (see O.C.G.A. § 23-1-18) or by statute (Ga. L. 1939, p. 345, § 1 (see O.C.G.A. T. 44, C. 14, Art. 9)), has for its purpose the protection of innocent purchasers of real property involved in pending litigation. Patent Scaffolding Co. v. Byers, 220 Ga. 426, 139 S.E.2d 332 (1964).

Lis pendens is the jurisdiction, power, or control which courts acquire over property involved in a suit, pending the continuance of the action, and until the final judgment therein. Coleman v. Law, 170 Ga. 906, 154 S.E. 445 (1930).

The underlying, if not the sole, object of the maxim "pendente lite nihil innoverture," is to keep the subject of the suit or res within the power of the court until the judgment or decree shall be entered, and thus to make it possible for courts of justice to give effect to their judgments and decrees. Carmichael Tile Co. v. Yaarab Temple Bldg. Co., 177 Ga. 318, 170 S.E. 294 (1933).

While special circumstances may alter the rule, it is the general rule that when the rights of the plaintiff to the property in question are secured under the rule of lis pendens, the judge in the exercise of the judge's discretion may refuse an interlocutory injunction. Ingram & Le Grand Lumber Co. v. McAllister, 188 Ga. 626, 4 S.E.2d 558 (1939).

Probate of will not within law of lis pendens. — An application in the court of ordinary (now probate court) to probate a will, which, although denied for lack of evidence to prove it, was still pending therein, was not a suit within the meaning of the law of lis pendens, and did not operate so as to affect the title of one who purchased at the sale of the administrator, the appointment and sale taking place subsequently to an order of the ordinary (now probate judge) denying probate, although the will on the original application was thereafter duly probated. Scarborough v. Long, 186 Ga. 412, 197 S.E. 796, cert. denied, 305 U.S. 637, 59 S. Ct. 107, 83 L. Ed. 410 (1938).

To the existence of a valid and effective lis pendens, it is essential that

Doctrine of Lis Pendens (Cont'd)
1. In General (Cont'd)

three elements be present: the property must be of a character to be subject to the rule; the court must have jurisdiction both of the person and the subject matter, and the property involved must be sufficiently described in the pleadings. Walker v. Houston, 176 Ga. 878, 169 S.E. 107 (1933); Carmichael Tile Co. v. Yaarab Temple Bldg. Co., 177 Ga. 318, 170 S.E. 294 (1933); Ingram & Le Grand Lumber Co. v. McAllister, 188 Ga. 626, 4 S.E.2d 558 (1939).

General rule is that lis pendens, duly prosecuted, and not collusive, is notice to purchaser so as to affect and bind the purchaser's interest by the decree. Ingram & Le Grand Lumber Co. v. McAllister, 188 Ga. 626, 4 S.E.2d 558 (1939).

Lis pendens in itself does not create a lien of any kind, but merely charges the purchaser with notice of the pending action. If the judgment in the pending action does not create a lien on the property, certainly notice of the action will not. Carmichael Tile Co. v. Yaarab Temple Bldg. Co., 177 Ga. 318, 170 S.E. 294 (1933).

2. Application of Doctrine

Doctrine of lis pendens applies to a suit brought by a creditor to prevent the debtor from conveying the debtor's property away with the fraudulent intent to hinder, delay, or defraud the creditor. Coleman v. Law, 170 Ga. 906, 154 S.E. 445 (1930).

Actions to reach property which has been fraudulently conveyed and suits to subject specific property to the payment of debts come within the doctrine of lis pendens. Coleman v. Law, 170 Ga. 906, 154 S.E. 445 (1930).

Rule of lis pendens applies to a creditor's suit to set aside a fraudulent conveyance made to defeat the creditor, so that the purchasers or other persons, acquiring interests pendente lite, take title subject to the decree in the suit. Coleman v. Law, 170 Ga. 906, 154 S.E. 445 (1930); Walker v. Houston, 176 Ga. 878, 169 S.E. 107 (1933).

Stranger's role in lis pendens. — The doctrine of lis pendens, properly understood and applied, will prevent a stranger from dealing with any of the parties to a pending proceeding in which a title to, or an interest in, or a lien upon designated and described real property is sought to be enforced after the proceeding is filed, and before the final decree, so as to acquire any interest in the premises involved capable of withstanding the force of the decree, or frustrating its full legal effect. Atlanta Nat'l Bank v. Brown, 173 Ga. 213, 159 S.E. 874 (1931).

Enforcement of equitable interest in trees. — If a lessee for sawmill purposes of growing trees sells the same on a valuable consideration, and afterwards colludes with a third person, who at the time of the sale has a suit pending against such lessee to establish and enforce an outstanding equitable interest in the trees, and so colluding accepts a valuable consideration from the third person, and on the basis thereof allows a consent verdict and decree for the plaintiff without trial of the issues in the case, such verdict and decree will be subject to collateral attack by the vendee as void on the ground of fraud, and will not be protected on the principle of lis pendens. In such a situation such third person should be treated as a subsequent purchaser, and not as one whose original claim became adjudicated in one's favor. Ingram & Le Grand Lumber Co. v. Burgin Lumber Co., 193 Ga. 404, 18 S.E.2d 774 (1942).

A suit for specific performance of a contract for the sale of land is "notice" of the claim that the plaintiff sets up therein, from the time it is commenced and docketed; and if duly prosecuted and not collusive, one purchasing the land pending the suit is affected by the final decree rendered therein, though the suit is in a county other than the one in which the land is located. Walker v. Houston, 176 Ga. 878, 169 S.E. 107 (1933).

Lis pendens does not apply to choses in action. Shadburn Banking Co. v. Streetman, 180 Ga. 500, 179 S.E. 377 (1935).

Restrictive covenants. — A lis pendens notice stating a claim to a contract right to buy certain lots in a subdi-

vision serves as notice to future purchasers of other lots in the subdivision that the lots described in the lis pendens notice are not encumbered by restrictive covenants recorded after the contract but before the sale of the other lots. Puryear v. Deakins, 258 Ga. 618, 373 S.E.2d 15 (1988).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17 Am. Jur. Pleading and Practice Forms, Lis Pendens, § 2 et seq.

C.J.S. — 54 C.J.S., Lis Pendens, §§ 2, 38.

ALR. — Judgment in favor of less than all parties to contract as bar to action against other parties, 2 A.L.R. 124.

Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 A.L.R. 306.

Judgment in action on commercial paper as affecting party to the paper who was not party to the suit, 34 A.L.R. 152.

Sufficiency of notice or knowledge of pendency of action against covenantee or his privy in order to bind the covenantor by judgment, 34 A.L.R. 1429.

Conclusiveness of decree assessing stockholders of insolvent corporation as against nonresident stockholders not personally served within the state in which it was rendered, 48 A.L.R. 669; 175 A.L.R. 1419.

Lis pendens as affecting property in county or district other than that in which action is pending, 71 A.L.R. 1085.

Doctrine of lis pendens as applied against one who takes deed pending action pursuant to executory contract entered into before action commenced, 93 A.L.R. 404.

Judgment as conclusive as against, or in favor of one not a party of record or privy to a party, who prosecuted or defended suit on behalf and in the name of party, or assisted him or participated with him in its prosecution or defense, 139 A.L.R. 9.

Decree on bill of review reversing prior decree as affecting purchaser or mortgagee of real property in the interval between the original decree and the filing of the bill of review, 150 A.L.R. 676.

Necessity of filing notice of lis pendens in suit to contest a will, 159 A.L.R. 386.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action, or vice versa, 94 A.L.R.3d 676.

23-1-19. Sale to one without notice; sale by one without notice.

If one with notice sells to one without notice, the latter shall be protected. If one without notice sells to one with notice, the latter shall be protected, as otherwise a bona fide purchaser might be deprived of selling his property for full value.

History. — Civil Code 1895, § 3938; Civil Code 1910, § 4535; Code 1933, § 37-114.

History of Code section. — This Code section is derived from the decision in Collins v. Heath, 34 Ga. 443 (1866).

Cross references. — Power of person possessing voidable title to transfer goods to good faith purchaser for value, § 11-2-403.

JUDICIAL DECISIONS

Analysis

General Consideration
Sale to One Without Notice
Sale by One Without Notice

General Consideration

Bona fide purchaser obtains good title notwithstanding forgery in chain of title. — Bonner v. Norwest Bank Inc., 275 Ga. 620 (2002), is inconsistent with the Second Refuge Church Inc. v. Lollar, 282 Ga. 721 (2007), line of cases and is overruled to the extent that the case extends the bona fide purchaser for value doctrine to those acquiring title under a grantee in a forged deed; Mabra v. Deutsche Bank Inc., 277 Ga. App. 764, (2006), is likewise overruled as Mabra also runs contrary to the Lollar line of cases, which does not recognize that the bona fide purchaser for value doctrine may apply when forgery occurs between spouses. Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010).

Cited in Malsby & Co. v. Widincamp, 24 Ga. App. 737, 102 S.E. 178 (1920); Luke v. Ashburn Bank, 40 Ga. App. 802, 151 S.E. 562 (1930); Gamble v. Brooks, 170 Ga. 662, 153 S.E. 759 (1930); Ryals v. Lindsay, 176 Ga. 7, 167 S.E. 284 (1932); Jones v. Edwards, 177 Ga. 723, 171 S.E. 285 (1933); Chestnut v. Weekes, 183 Ga. 367, 188 S.E. 714 (1936); Reynolds v. Smith, 186 Ga. 838, 199 S.E. 137 (1938); Lewis v. Patterson, 191 Ga. 348, 12 S.E.2d 593 (1940); Fraser v. Dolvin, 199 Ga. 638, 34 S.E.2d 875 (1945); Taylor v. Perdue, 206 Ga. 763, 58 S.E.2d 902 (1950); Mathis v. Blanks, 212 Ga. 226, 91 S.E.2d 509 (1956); Arnold v. Conner, 100 Ga. App. 503, 111 S.E.2d 638 (1959); Murray v. Johnson, 222 Ga. 788, 152 S.E.2d 739 (1966); Leachman v. Cobb Dev. Co., 226 Ga. 103, 172 S.E.2d 688 (1970); Jones v. Childs, 141 Ga. App. 552, 234 S.E.2d 87 (1977); Citizens & S. Bank v. Morris State Bldg. Corp., 243 Ga. 169, 253 S.E.2d 89 (1979); Bloodworth v. Sandersville Prod. Credit Ass'n, 245 Ga. 40, 262 S.E.2d 804 (1980); DOT v. Brooks, 254 Ga. 303, 328 S.E.2d 705 (1985); Anderson v. Streck, 190 Ga. App. 224, 378 S.E.2d 526 (1989); Dime Savs. Bank v. Sandy Springs Assocs., 261 Ga. 485, 405 S.E.2d 491 (1991); Farris v. Nationsbanc Mtg. Corp., 268 Ga. 769, 493 S.E.2d 143 (1997).

Sale to One Without Notice

A presumption of good faith attaches to one who is a purchaser for value, which remains until overcome by proof. Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84 (1945).

Child born after execution of will and ability to contest purchase by third party. — A son shown to have been born subsequently to the execution of a will is not entitled to recover in ejectment against a purchaser for a valid consideration who relied on the judgment of the court of ordinary (now probate court) probating the will in solemn form, and who purchased prior to any proceeding to set aside such judgment. Mitchell v. Arnall, 203 Ga. 384, 47 S.E.2d 258 (1948).

Administrator's buying property at sale. — When an administrator sells decedent's estate at public outcry and the administrator buys back as an individual the property on the same day that one as administrator conveyed the property away, the fact that the deeds were made on the same day and recited the same consideration does not amount to a void administrator's sale, and notice of the alleged fraud is not presumed. When later purchasers of the land pay value in money for the land purchased, they are presumed to be bona fide purchasers without notice. Thomas v. Couch, 171 Ga. 602, 156 S.E. 206 (1930).

It was not error to refuse to charge the principle that, when one attests a deed with full knowledge of the deed's contents, one is estopped to assert an interest in the land conveyed outstanding in oneself against the grantee; the evidence that a witness to petitioner's tax deed was an agent of the owner and grantor of the defendant did not authorize it, and even if the act and knowledge of the agent were attributed to the owner, defendant, without notice thereof, would not be bound. McDonald v. Wimpy, 206 Ga. 270, 56 S.E.2d 524 (1949).

Purchaser of real estate is not bound by recitals in a deed executed by the grantor to realty not embraced in the purchaser's purchase, and which therefore does not constitute a muniment in his chain of title. Thompson v. Randall, 173 Ga. 696, 161 S.E. 377 (1931).

A bona fide sale of property, not made to hinder, delay, or defraud

creditors, is not rendered invalid because the vendor may have been insolvent at the time. Wells v. Blitch, 184 Ga. 616, 192 S.E. 209 (1937).

Sale of real estate to innocent purchaser divests title of heirs. — Superior court did not err in granting a purchaser summary judgment in an administrator's action alleging that the purchaser aided and abetted an executor's breach of fiduciary duties when it bought properties from the executor but did not meet its burden of proving payment merely by producing recitations of the alleged consideration; the probate court's order authorizing the executor to disburse estate property was valid on its face, the sale did not violate the terms of the power of sale in a testatrix's will, and the sale of real estate to an innocent purchaser divested the title of the heirs, although there could be irregularities. Witcher v. JSD Props., LLC, 286 Ga. 717, 690 S.E.2d 855 (2010).

Prior possession of land is not notice to a purchaser. — Possession of real property which will charge a purchaser with notice is possession at the time the purchaser obtains title. McDonald v. Taylor, 200 Ga. 445, 37 S.E.2d 336 (1946).

The rule in this section is subject to a notable exception; and that is, a conveyance is not protected when made back to a former owner who had notice of the equity, and who did not originally derive title through a bona fide holder. Thompson v. Randall, 173 Ga. 696, 161 S.E. 377 (1931).

Impact of forgery upon bona fide purchaser. — Trial court erred in holding that a mortgage company had a valid security interest as to the other one-half undivided interest in certain property because the company could not acquire a valid security interest in the entire property by virtue of the company's status, if any, as a bona fide purchaser for value; a bona fide purchaser for value, or a security deed holder occupying such position, obtains good title notwithstanding a forgery in the chain of title. Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010).

A 2003 warranty deed that operated to release a prior lender's security interest in the property was not a forgery but was signed by someone fraudulently assuming the authority of an officer of the prior lender and was regular on the deed's face. Therefore, a subsequent lender that foreclosed on the property and purchased the property at the foreclosure sale was a bona fide purchaser for value entitled to take the property free of the prior lender's security interest. Deutsche Bank Nat'l Trust Co. v. JP Morgan Chase Bank, N.A., 307 Ga. App. 307, 704 S.E.2d 823 (2010).

Purchasers entitled to protection of bona fide purchaser for value. — There was no error in the trial court's grant of summary judgment to a bank and nursery in a daughter's action to cancel deeds executed by her mother before her death to the bank and the nursery because they were entitled to the protection of bona fide purchaser for value under O.C.G.A. §§ 23-1-19 and 23-1-20; the title search showed that the property was transferred to the mother via the will of the daughter's father through a trustees deed of distribution from the remainder trust to the primary beneficiary of the trust, and there was nothing in the chain of title or the trust instruments that would put either the bank or nursery on notice that there were any issues affecting title to the properties because the wording of the trusts allowed the trustees to sell or dispose of any property, at any time, for reasons the trustees deemed best, for the benefit of the mother. Kitchings v. Ameris Bank, 309 Ga. App. 837, 711 S.E.2d 392 (2011).

Agreement to supply water did not obligate purchaser without notice. — Even if an agreement between property owners providing that the property with a well would supply water to the adjacent property was a covenant running with the land, a later purchaser of the well property did not have actual or constructive notice of that agreement and was not bound by that agreement because the agreement was recorded outside the chain of title. McLeod v. Clements, 297 Ga. 371, 774 S.E.2d 102 (2015).

Sale by One Without Notice

Protection of purchaser with notice predicated on bona fides of vendor. —

Sale by One Without Notice (Cont'd)

A purchaser of land with notice of outstanding equities, from one who was without notice thereof and was entitled to status of bona fide purchaser, will be protected in one's title on account of the bona fides of one's vendor, and it is wholly immaterial of what nature the equity is, whether it is a lien, or an encumbrance, or a trust, or any other claim; for a bona fide purchaser of an estate, for a valuable consideration, purges away the equity from the estate in the hands of all persons who may derive title to it. Thompson v. Randall, 173 Ga. 696, 161 S.E. 377 (1931).

A deed of prior date loses its priority over a subsequent deed from the same vendor, which is based on a valuable consideration, taken without notice of the existence of the first and is the second deed being the first to go to record in the office of the clerk of the superior court of the county where the land lies, and even if the vendee in the second deed took with notice, a grantee of the latter who took without notice would be protected. Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84 (1945).

RESEARCH REFERENCES

ALR. — Pledgee of corporate stock as security for an antecedent debt as a bona fide purchaser within the rule which protects such purchasers against the equities of third persons, 9 A.L.R. 1619.

Right of one who, with knowledge of outstanding equity, derived his interest in real property from or through a bona fide purchaser, to same protection as latter, 63 A.L.R. 1362.

Bona fides of purchaser of bill or note on an executory consideration, 100 A.L.R. 1357.

Reputation in the community as to title to or interest in land as charging one with notice or putting him on inquiry, as regards his status as innocent purchaser or mortgagee, 109 A.L.R. 746.

What constitutes notice to subsequent purchaser of real property of option to purchase contained in unrecorded lease, 17 A.L.R.2d 331.

Motor vehicle certificate of title or similar document as, in hands of one other than legal owner, indicia of ownership justifying reliance by subsequent purchaser or mortgagee without actual notice of other interests, 18 A.L.R.2d 813.

Rights as between purchaser of timber and subsequent vendee of land, 18 A.L.R.2d 1150.

Relative rights in real property as between purchasers from or through decedent's heirs or devisees and unknown surviving spouse, 39 A.L.R.2d 1082.

Knowledge or notice of inadequacy of consideration for conveyance in chain of title as affecting bona fide status of purchaser, 42 A.L.R.2d 1088.

Relative rights as between purchaser of chattel from one who had previously bought it with stolen money, and victim of the theft, 62 A.L.R.2d 537.

Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor, 82 A.L.R.3d 1040.

23-1-20. Interference with bona fide purchaser.

A bona fide purchaser for value without notice of an equity will not be interfered with by equity.

History. — Orig. Code 1863, § 3025; Code 1868, § 3037; Code 1873, § 3092; Code 1882, § 3092; Civil Code 1895, § 3934; Civil Code 1910, § 4531; Code 1933, § 37-111.

Law reviews. — For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?," see 45 Ga. L. Rev. 877 (2011).

JUDICIAL DECISIONS

Section constitutes mandatory charge to jury. — When this section is applicable to a case, and warranted both by the pleadings and the evidence, it should be given as a charge to the jury, even in the absence of a request. Anderson v. Barron, 208 Ga. 785, 69 S.E.2d 874 (1952).

Bona fide purchaser obtains good title notwithstanding forgery in chain of title. — Trial court erred in holding that a mortgage company had a valid security interest as to the other one-half undivided interest in certain property because the company could not acquire a valid security interest in the entire property by virtue of the company's status, if any, as a bona fide purchaser for value; a bona fide purchaser for value, or a security deed holder occupying such position, obtains good title notwithstanding a forgery in the chain of title. Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010).

Bonner v. Norwest Bank Inc., 275 Ga. 620 (2002), is inconsistent with the Second Refuge Church Inc. v. Lollar, 282 Ga. 721 (2007), line of cases and is overruled to the extent that the case extends the bona fide purchaser for value doctrine to those acquiring title under a grantee in a forged deed; Mabra v. Deutsche Bank Inc., 277 Ga. App. 764 (2006), is likewise overruled as Mabra also runs contrary to the Lollar line of cases, which does not recognize that the bona fide purchaser for value doctrine may apply when forgery occurs between spouses. Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010).

A bona fide purchaser without notice acquires an unqualified legal right and title to the property purchased; and a court of equity has no jurisdiction to interfere with such vested legal right and title. Gamble v. Brooks, 170 Ga. 662, 153 S.E. 759 (1930); Jenkins v. Sosebee, 74 Bankr. 440 (Bankr. N.D. Ga. 1987). See.

A bona fide purchaser for value, and without notice of an equity, will not be interfered with by a court of equity and this doctrine proceeds on the idea that the equity of the innocent purchaser is superior to that of the cestui que trust, who stands silently by and permits such purchaser to act to the purchaser's own injury, or who is guilty of laches in not sooner asserting a mere secret equity. Gamble v. Brooks, 170 Ga. 662, 153 S.E. 759 (1930).

When the absolute title to property is apparently in a vendor or mortgagor, the vendee or mortgagee is protected, unless the one seeking to set up a lien or trust against the property can show that the vendee or mortgagee had notice of trust funds having gone into the property. Tattnall Bank v. Harvey, 186 Ga. 752, 198 S.E. 724 (1938).

Plaintiff may not reform the plaintiff's deed because of mutual mistake, third party acquired title subsequently to that deed and is an innocent purchaser without notice of such mistake. Cox v. Zucker, 214 Ga. 44, 102 S.E.2d 580 (1958).

Reformation of agreement was not permitted against bona fide purchaser of promissory note. — In a suit on a promissory note by a lender's assignee, although some evidence supported the borrowers' claim that terms in a Forbearance Agreement (FA) binding the guarantors were the product of mutual mistake and release of the guarantors was intended, the trial court erred in reforming the FA because the borrowers had not overcome the presumption that the assignee was a bona fide purchaser for value without notice of the mistake. Hamilton State Bank v. Kelly Capital Invs., LLC, 335 Ga. App. 252, 779 S.E.2d 757 (2015).

While it is the rule that a bona fide purchaser of property in which trust funds have been invested is protected, the beneficiary of a trust estate may at the beneficiary's option, within a reasonable time, "affirm or reject an unauthorized investment by the trustee," and equity will aid the beneficiary in recovering the funds or property, or enforcing a lien for the wrongfully used funds, provided that the assets can be traced and remain in the hands of a person "affected with notice of the misapplication." Tattnall Bank v. Harvey, 186 Ga. 752, 198 S.E. 724 (1938).

Recital of consideration insufficient. — While proof of payment of the purchase money alone raises a presumption of good faith, and carries the burden of claimant, when no testimony was introduced to prove that the consideration recited in the deed was in fact paid, nor was it otherwise proved to have been paid, the recital of the consideration in the deed and the recital therein that it was paid does not carry the burden of proving payment of the purchase money. Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942).

Owner's negligence impacting bona fide purchaser. — The fact that the owner of the automobile, estranged from the owner's spouse, negligently allowed the spouse to get possession of the keys and the automobile and to thereafter drive it to another city and sell it to a dealer in automobiles of the same make was not such an act as clothed the spouse, who had no interest therein, with the external indicia of ownership and right of disposition, so as to enable the spouse to pass the dealer such title to the automobile that the dealer could in turn give to a third-party purchaser clear title which would defeat the right of the true owner to recover the automobile in a trover action, nor did the act require a finding that the third-party purchaser was a bona fide purchaser for value without notice of any infirmity in the title to the automobile. Arnold v. Conner, 100 Ga. App. 503, 111 S.E.2d 638 (1959).

Purchase at administrator's sale. — When one purchases land at an administrator's sale duly authorized by order of the court of ordinary (now probate court), which land was in the possession of such administrator, one's deed will not be canceled on the petition of parties claiming an equitable title to such land, of which equity the purchaser had no notice. Beecher v. Carter, 189 Ga. 234, 5 S.E.2d 648 (1939).

No right to cancellation of deed. — When a purchaser of land from one in possession, who holds a deed thereto which is absolute on its face, has paid the purchase price and taken possession, parties claiming an equity therein of which the purchaser had no notice are not entitled to have the purchaser's deed canceled. Beecher v. Carter, 189 Ga. 234, 5 S.E.2d 648 (1939).

Third party purchasers without notice of chattel mortgages. — When third-party purchasers of chattels were bona fide purchasers for value without notice of the chattel mortgages, it is not error to sustain their general demurrers (now motions to dismiss) to the mortgagee's petition for equitable foreclosure. Morris & Eckels Co. v. Fulton Nat'l Bank, 208 Ga. 222, 65 S.E.2d 815 (1951).

Purchaser of real estate is not bound by recitals in a deed executed by the purchaser's grantor to realty not embraced in the purchase, and which, therefore, does not constitute a muniment in purchaser's chain of title. Thompson v. Randall, 173 Ga. 696, 161 S.E. 377 (1931).

Purchaser must retain bona fides until purchase money actually paid. — It is a rule in equity that a bona fide purchaser without notice, to be entitled to protection, must be so, not only at the time of the contract or conveyance, but until the purchase money is actually paid. Ross v. Rambo, 195 Ga. 100, 23 S.E.2d 687 (1942).

A partial payment of the purchase money before notice of the equitable title of the true owners, although not sufficient to invest the vendee with the character of a bona fide purchaser as regards the entire estate purchased, will entitle the vendee to invoke the aid of the equitable principle that the vendee who asks equity must do equity and to be reimbursed for the amount actually paid before. Ross v. Rambo, 195 Ga. 100, 23 S.E.2d 687 (1942).

Bona fide purchaser not found when purchased with notice of quiet title action. — Investment company was not entitled to the protection accorded to bona fide purchasers because the company admitted that the company had actual knowledge of the quiet title action filed by a bank as well as the recorded lis pendens before purchasing the subject property at a foreclosure sale; because a grantee's security deed was recorded with the maturity date clearly set forth, the company was on constructive notice that the date of the reversion of the title inter-

est, pursuant to O.C.G.A. § 44-14-80(a)(1), had occurred before the foreclosure sale. MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485 (2011).

Purchasers entitled to protection of bona fide purchaser for value. — There was no error in the trial court's grant of summary judgment to a bank and nursery in a daughter's action to cancel deeds executed by her mother before her death to the bank and the nursery because they were entitled to the protection of bona fide purchaser for value under O.C.G.A. §§ 23-1-19 and 23-1-20; the title search showed that the property was transferred to the mother via the will of the daughter's father through a trustees deed of distribution from the remainder trust to the primary beneficiary of the trust, and there was nothing in the chain of title or the trust instruments that would put either the bank or nursery on notice that there were any issues affecting title to the properties because the wording of the trusts allowed the trustees to sell or dispose of any property, at any time, for reasons the trustees deemed best, for the benefit of the mother. Kitchings v. Ameris Bank, 309 Ga. App. 837, 711 S.E.2d 392 (2011).

Although a county failed to comply with O.C.G.A. § 36-9-2 by recording a transfer in the minutes when the county conveyed the county's interest in property the county had formerly acquired by eminent domain to the county development authority, a subsequent purchaser was a bona fide purchaser without notice of this irregularity under O.C.G.A. § 23-1-20, so that the county's title was superior to that of the condemnee's heirs, who sought to repurchase the property under O.C.G.A. § 36-9-3(g)(3)(B). Darling Int'l, Inc. v. Carter, 294 Ga. 455, 754 S.E.2d 347 (2014).

Bona fide purchaser status properly denied. — Trial court did not err in denying purchasers and the holders of two outstanding security deeds bona fide purchaser status because a quitclaim deed showed on the deed's face that a parent signed the deed as the children's purported "guardian"; thus, the designation of a "guardian" in the chain of title put the purchasers and holders on notice of the need to confirm the parent's legal authority to convey the children's interest in the property. Chase Manhattan Mortg. Corp. v. Shelton, 290 Ga. 544, 722 S.E.2d 743 (2012).

Cited in Long v. Atlanta Trust Co., 164 Ga. 21, 137 S.E. 394 (1927); Rountree v. Davis, 90 Ga. App. 223, 82 S.E.2d 716 (1954); Mathis v. Blanks, 212 Ga. 226, 91 S.E.2d 509 (1956); Ayers v. Carden, 212 Ga. 510, 93 S.E.2d 694 (1956); W.L. Schautz Co. v. Duncan Hosiery Mills, Inc., 218 Ga. 729, 130 S.E.2d 496 (1963); Todd v. Conner, 220 Ga. 173, 137 S.E.2d 614 (1964); DOT v. Brooks, 254 Ga. 303, 328 S.E.2d 705 (1985); Anderson v. Streck, 190 Ga. App. 224, 378 S.E.2d 526 (1989); Dime Savs. Bank v. Sandy Springs Assocs., 261 Ga. 485, 405 S.E.2d 491 (1991); Tower Fin. Servs., Inc. v. Smith, 204 Ga. App. 910, 423 S.E.2d 257 (1992); Farris v. Nationsbanc Mtg. Corp., 268 Ga. 769, 493 S.E.2d 143 (1997).

RESEARCH REFERENCES

ALR. — Pledgee of corporate stock as security for an antecedent debt as a bona fide purchaser within the rule which protects such purchasers against the equities of third persons, 9 A.L.R. 1619.

Right of one who, with knowledge of outstanding equity, derived his interest in real property from or through a bona fide purchaser, to same protection as latter, 63 A.L.R. 1362.

Bona fides of purchaser of bill or note on an executory consideration, 100 A.L.R. 1357.

What constitutes notice to subsequent purchaser of real property of option to purchase contained in unrecorded lease, 17 A.L.R.2d 331.

Motor vehicle certificate of title or similar document as, in hands of one other than legal owner, indicia of ownership justifying reliance by subsequent purchaser or mortgagee without actual notice of other interest, 18 A.L.R.2d 813.

Rights as between purchaser of timber and subsequent vendee of land, 18 A.L.R.2d 1150.

Relative rights in real property as between purchasers from or through decedent's heirs or devisees and unknown surviving spouse, 39 A.L.R.2d 1082.

Extension of time or forbearance to sue as consideration constituting mortgagee bona fide purchaser, 39 A.L.R.2d 1088.

Knowledge or notice of inadequacy of consideration for conveyance in chain of title as affecting bona fide status of purchaser, 42 A.L.R.2d 1088.

Relative rights as between purchaser of chattel from one who had previously bought it with stolen money, and victim of the theft, 62 A.L.R.2d 537.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 A.L.R.2d 1180.

Right to follow chattel into hands of purchaser who took in payment of preexisting debt, 11 A.L.R.3d 1028.

Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor, 82 A.L.R.3d 1040.

23-1-21. Compulsion to litigate.

Equity will not force persons to litigate in order to have done what they ought to do and are willing to do voluntarily.

History. — Civil Code 1895, § 3935; Civil Code 1910, § 4532; Code 1933, § 37-118.

History of Code section. — This Code section is derived from the decisions in Sperry & Niles v. Haslam, 57 Ga. 412 (1876) and Blalock v. Newhill, 78 Ga. 245, 1 S.E. 383 (1887).

JUDICIAL DECISIONS

Cited in Rowe v. Cole, 176 Ga. 592, 168 S.E. 882 (1933); Robertson v. Webster, 79 Ga. App. 30, 52 S.E.2d 511 (1949); Bell v. Fine Prods. Co., 139 Ga. App. 878, 229 S.E.2d 808 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 15.

ALR. — Mistake in lease as ground for relief, 26 A.L.R. 472.

23-1-22. Interference with creditor.

A diligent creditor shall not needlessly be interfered with in the prosecution of his legal remedies.

History. — Civil Code 1895, § 3942; Civil Code 1910, § 4539; Code 1933, § 37-121.

History of Code section. — This Code section is derived from the decision in Burgwyn Bros. Tobacco Co. v. Bentley & Co., 90 Ga. 508, 16 S.E. 216 (1892).

JUDICIAL DECISIONS

Compulsion to litigate generally. — When grievance is not that Public Service Commission refuses to hear and act upon an application of the telephone company for increased rates, but that the commission, having so heard and acted thereon, has fixed rates that are confiscatory, mandamus could merely require that the commission act again in the exercise of that discretion vested in it by law. If the evi-

dence shows that the rates ordered will result in confiscation, equity has jurisdiction to render the judgment complained of. Rates that are unjustly and unreasonably low are confiscatory. Southern Bell Tel. & Tel. Co. v. Georgia Pub. Serv. Comm'n, 203 Ga. 832, 49 S.E.2d 38 (1948).

Remedy not "needlessly" interfered with. — O.C.G.A. § 23-1-22 did not provide grounds for refusing to allow a debtor corporation to assert an alter ego cause of action against its former principal or for allowing a creditor to bring an alter ego action against the former principal in state court as the creditor's chosen remedy was interfered with only because, in bankruptcy, all unsecured creditors with like claims were to be treated equally. Baillie Lumber Co. v. Thompson, 279 Ga. 288, 612 S.E.2d 296 (2005).

Cited in Saul v. Vaughn & Co., 240 Ga. 301, 241 S.E.2d 180 (1977).

23-1-23. Construction of conditions; relief against forfeitures.

Where the rules of construction will allow, equity seeks always to construe conditions subsequent into covenants and to relieve against forfeitures.

History. — Orig. Code 1863, § 3048; Code 1868, § 3060; Code 1873, § 3115; Code 1882, § 3115; Civil Code 1895, § 3971; Civil Code 1910, § 4568; Code 1933, § 37-216.

JUDICIAL DECISIONS

Analysis

General Consideration
Construction Generally
Forfeitures

General Consideration

Construction generally. — When there are no express words of defeasance, forfeiture, or reversion, words in a deed will be construed as words of covenant and not words of condition. The remedy for a breach by one having the right to enforce the deed is an action for damages and not a forfeiture of the estate for condition broken. Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969); Kitchens v. Atlantic Steel Co., 123 Ga. App. 812, 182 S.E.2d 530 (1971), aff'd, 228 Ga. 708, 187 S.E.2d 824 (1972).

Lease provision requiring lessor to modify building in accordance with blueprint and city requirements was a covenant, and not words of condition; and the remedy for a breach was an action for damages, and not a forfeiture of the estate for condition broken. Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989).

Cited in Grantham v. Royal Ins. Co., 34 Ga. App. 415, 130 S.E. 589, cert. denied, 34 Ga. App. 836 (1925); Hardeman v. Ellis, 162 Ga. 664, 135 S.E. 195 (1926); A.C. Alexander Lumber Co. v. Bagley, 184 Ga. 352, 191 S.E. 446 (1937); Crisp County Lumber Co. v. Bridges, 187 Ga. 484, 200 S.E. 777 (1939); Golden v. National Life & Accident Ins. Co., 189 Ga. 79, 5 S.E.2d 198 (1939); Simpson v. Blanchard, 73 Ga. App. 843, 38 S.E.2d 634 (1946); Churches Homes for Bus. Girls, Inc. v. Manget Found., Inc., 110 Ga. App. 539, 139 S.E.2d 138 (1964); White v. Turbidy, 227 Ga. 825, 183 S.E.2d 363 (1971); Kiser v. Warner Robins Air Park Estates, Inc., 237 Ga. 385, 228 S.E.2d 795 (1976).

Construction Generally

Determination of condition precedent or subsequent. — Deed that the grantor, in consideration of payment by grantees of certain indebtedness and of their support and maintenance of the grantor during the remainder of the

Construction Generally (Cont'd)

grantor's life, conveyed the described premises, did not create a condition subsequent which, upon the failure of the grantees to support and maintain the grantor, would result in a forfeiture of the estate conveyed, but such language created a covenant binding the grantees therein to perform; upon their failure to perform, if the grantor had been in life, the grantor might have rescinded the contract by restoring to the grantees that part of the consideration represented by the payment of the grantor's indebtedness, offset by any profits they might have derived from the conveyance to them. Jones v. Reid, 184 Ga. 764, 193 S.E. 235 (1937).

While it is not always easy to determine whether the condition created by the terms of a conveyance is precedent or subsequent, the general rule is that, if the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before vesting of the estate, or if from the nature of the act to be performed, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act taking possession, then the condition is subsequent. Gordon v. Whittle, 206 Ga. 339, 57 S.E.2d 169 (1950).

If, upon a strict construction of a deed in its entirety (there being no express words of defeasance), it should be doubtful whether the instrument created an estate upon condition subsequent, or the words employed imported covenant, the latter construction should be adopted. Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969).

When a deed purports to convey a fee simple title and there is no provision in the deed for a forfeiture of the estate or a reversion to the grantor in the event the grantee conveyed the property to another without the consent of one's brothers, restrictive words in the deed are words of covenant and not a condition subsequent. Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969).

A deed will not be construed as a grant on condition subsequent unless the language used by express terms creates an estate on condition or unless the intent of the grantor to create a conditional estate is manifest from a reading of the entire instrument. Gordon v. Whittle, 206 Ga. 339, 57 S.E.2d 169 (1950); Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969); Floyd v. Hoover, 141 Ga. App. 588, 234 S.E.2d 89 (1977).

Impact of valid condition subsequent in deed. — Provision in deed that title "reverts back to the grantor if the grantee denies grantor her right to live on said property with him as his wife or without him" created a valid condition subsequent, and stipulated in terms that a breach of such condition by the grantee husband would cause the title to revert; and this would give to the grantor wife the right of reentry; however, if performance by the husband of such a condition subsequent was made impossible by acts or conduct on the part of the wife herself, the rule would be otherwise. Turner v. Turner, 186 Ga. 223, 197 S.E. 771 (1938).

Forfeitures

Courts do not generally favor forfeitures and this rule is applicable to insurance contracts. Cotton States Mut. Ins. Co. v. Torrance, 110 Ga. App. 4, 137 S.E.2d 551 (1964), aff'd, 220 Ga. 639, 140 S.E.2d 840 (1965).

While forfeitures are not favored, forfeitures are not altogether prohibited in this state. Cotton States Mut. Ins. Co. v. Torrance, 110 Ga. App. 4, 137 S.E.2d 551 (1964), aff'd, 220 Ga. 639, 140 S.E.2d 840 (1965).

Conditions subsequent in deeds, although not favored, will be enforced by the court when the conditions are clearly created and are not inconsistent with the other terms of the conveyance, and are not rendered impossible by the act of God or by the subsequent conduct of the grantor. Evans v. Brown, 196 Ga. 634, 27 S.E.2d 300 (1943).

While forfeitures are not unlawful, the law does not favor forfeitures, and all ambiguities in a contract are to be resolved against their existence; but when a contract in unmistakable terms provides for a forfeiture, and is otherwise free from legal infirmity, neither a court of law nor a court of equity will relieve against the

forfeiture. Cotton States Mut. Ins. Co. v. Torrance, 110 Ga. App. 4, 137 S.E.2d 551 (1964), aff'd, 220 Ga. 639, 140 S.E.2d 840 (1965).

The condition subsequent, with right of reentry, and forfeiture of the estate conveyed grantee, is not void because it could work a forfeiture. If a valid limitation imposed against alienation is interwoven with, so as to constitute a part of, the grant itself, the grant will be treated as a defeasible estate, and upon the inhibition being violated the estate conveyed is forfeited and terminates. Floyd v. Hoover, 141 Ga. App. 588, 234 S.E.2d 89 (1977).

Conditions in a deed which tend to destroy an estate are not favored in law and such conditions must be strictly construed against forfeiture. Kitchens v. Atlantic Steel Co., 123 Ga. App. 812, 182 S.E.2d 530 (1971), aff'd, 228 Ga. 708, 187 S.E.2d 824 (1972).

When there is a breach of a covenant which authorizes the forfeiture of the lease, the prompt assertion thereof by the lessor will operate to defeat the lessee's privilege to renew; however, forfeitures by acts of a party to a lease because of a breach of a covenant or condition are not favored by the courts. Pritchett v. King, 56 Ga. App. 788, 194 S.E. 44 (1937).

The general rule is that the breach by a lessee of the covenants or stipulations on one's part contained in the lease does not work a forfeiture of the term in the absence of an express proviso to that effect in the lease, the lessor's remedy being by way of a claim for damages. Pritchett v. King, 56 Ga. App. 788, 194 S.E. 44 (1937).

When a contract does not provide in express terms for a forfeiture upon a breach of the covenant, the presumption is that the lessor will be content with such right as is conferred by the ordinary remedies. Pritchett v. King, 56 Ga. App. 788, 194 S.E. 44 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 74 et seq.

C.J.S. — 30 C.J.S., Equity, § 56 et seq.

ALR. — Distinction between condition and covenant in grant of land for church purposes, 7 A.L.R. 1429.

Relief of purchaser against forfeiture of land contract, 40 A.L.R. 182.

Constitutionality of statute relieving against forfeiture of bail or recognizance, 43 A.L.R. 1233.

Continued use of property for burial purposes as a condition subsequent of a conveyance of dedication of land for that purpose, 47 A.L.R. 1174.

Covenant in mining lease to develop property as affected by provisions for delay rental, 67 A.L.R. 221.

Commencement of development within fixed term as extending term of oil and gas lease, 67 A.L.R. 526.

Validity and effect of covenant by lessee, as regards his activities after expiration of lease, 122 A.L.R. 1031.

Execution of new lease as within contemplation of option for extension or renewal of lease, 172 A.L.R. 1205.

Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental, strictly on time, 5 A.L.R.2d 993.

Relief against forfeiture of lease for nonpayment of rent, 31 A.L.R.2d 321.

Waiver of, or estoppel to assert, condition subsequent or its breach, 39 A.L.R.2d 1116.

Enforcement of, or waiver of or estoppel to assert, forfeiture clause of lease made or held by cotenants as lessors, 50 A.L.R.2d 1365.

23-1-24. When election between benefits compelled.

A case of election arises whenever a person is entitled to one of two benefits, to each of which he has legal title; but the enforcement of both would be unconscionable and inequitable to others having claims upon the same property or fund. In such cases equity may compel an election.

History. — Orig. Code 1863, § 3092; Code 1868, § 3104; Code 1873, § 3161; Code 1882, § 3161; Civil Code 1895, § 4012; Civil Code 1910, § 4609; Code 1933, § 37-501.

Cross references. — Elections relating to deeds, § 44-5-37. Elections relating to wills, § 53-2-111 et seq.

JUDICIAL DECISIONS

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General Consideration

For discussion of doctrine of election by legatee, see State Banking Co. v. Hinton, 178 Ga. 68, 172 S.E. 42 (1933).

Principles stated in former Code 1933, §§ 28-106 and 37-501 (see O.C.G.A. §§ 18-2-2 and 23-1-24) did not mean that a creditor having a priority against a fund in court can be required to relinquish his direct claim thereon, and proceed at his own additional expense with delay in an independent suit upon an indemnifying bond from the debtor, which does not by its terms protect the creditor seeking to compel such election. Savannah Bank & Trust Co. v. Meldrim, 195 Ga. 765, 25 S.E.2d 567 (1943).

Determination of ownership required prior to election. — A plaintiff would not be compelled to elect between a legacy and a "mere claim" to property until after there has been an adjudication of the question whether or not one is in fact the owner of an interest in the property disposed of by the will, and then only in the event this issue is determined in one's favor; since, if one were first compelled to elect, and one should for any reason fail in the trial to establish one's claim, there would be no defeated or disappointed legatees to compensate, but, on the contrary, the other legatees would get the very property one claimed. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937).

Cited in Federal Land Bank v. Farmers' & Merchants' Bank, 177 Ga. 505, 170 S.E. 504 (1933); State Banking Co. v. Hinton, 178 Ga. 68, 172 S.E. 42 (1933); Head v. Scruggs, 178 Ga. 324, 173 S.E. 113 (1934); Brown v. Smith, 50 Ga. App. 332, 178 S.E. 180 (1935); Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937); Irwin v. Willis, 202 Ga. 463, 43 S.E.2d 691 (1947).

Compulsion to Elect

Election is choice between proffered benefit and retention of own property. — An "election" in equity is a choice which a person is compelled to make between the acceptance of a benefit under an instrument and the retention of one's own property which is attempted to be disposed of by that instrument. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937).

The doctrine of election as applied to wills, against one claiming inconsistent benefits, arises when the testator "has attempted to give property not one's own, and has given a benefit to a person to whom that property belongs," in which case "the devisee or legatee shall elect either to take under or against the will." It is applicable when the instrument confers upon one a benefit while attempting to dispose of one's own property, in which event such person must elect whether to accept the benefit under the instrument or retain one's property. However, this doctrine does not apply when testamentary disposition describes no specific property so as to identify it with that of the claimant, but describes the property only generally, as "all my real and personal property and all property of every kind and character owned by me at my death," since the testator would be presumed to have intended to bequeath only what one actually owned and could lawfully dispose of. First Nat'l Bank & Trust Co. v. Roberts, 187 Ga. 472, 1 S.E.2d 12 (1939).

A case of election only arises when a person is entitled to one of two benefits to each of which the person has the legal title, and an election can

exist only when there is a choice between two or more inconsistent remedies actually existing at the time of election. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937).

The choice is compulsory between two inconsistent rights or claims when there is a clear intention of the testator that the beneficiary shall not enjoy both. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937).

When a testator, after devising property owned by the testator to one beneficiary, assumes to devise to another property belonging to the first devisee, the devisee of the property owned by the testator, if the devisee accepts the devise with knowledge of the facts, is precluded from asserting a claim to the devisee's own property devised to the other beneficiary. The beneficiary must elect between keeping the devisee's own and taking what is given by the will. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937).

The fact that a sheriff who had collected taxes which were unaccounted for, had given a bond with a surety, conditioned on the faithful performance of the sheriff's duties, would not create a case for compulsory election, so as to require the county officials claiming the tax moneys to relinquish, for the benefit of a creditor bank, their direct claim of priority from the funds of the decedent in the registry of the court, and to proceed, with delay and additional expense, by a suit on the bond. Savannah Bank & Trust Co. v. Meldrim, 195 Ga. 765, 25 S.E.2d 567 (1943).

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Election of Remedies, § 2.

ALR. — A provision in land contract for pecuniary forfeiture or penalty by a party is default as affecting the right of the other party to specific performance, 32 A.L.R. 584; 98 A.L.R. 877.

Election of remedies: inconsistency of action for damages for fraud and suit to establish constructive trust based on same transaction, 43 A.L.R. 177.

Attempt to reform contract as election of remedies precluding action to enforce contract as written or vice versa, 49 A.L.R. 1513.

Revocation of election to take under or contrary to will, 81 A.L.R. 740; 71 A.L.R.2d 942.

Election of remedies by owner against public authority or corporation having power of eminent domain which unauthorizedly enters land without instituting valid eminent domain proceedings, 101 A.L.R. 373.

What amounts to widow's election as between antenuptial or postnuptial settlement and husband's will or her rights under statute of descent and distribution, or attack by her upon such settlement, 117 A.L.R. 1001.

Judgment for debt without foreclosure of mortgage securing it as affecting mortgage, or right to foreclose the same, where no execution or attachment is levied under the judgment, 121 A.L.R. 917.

Bank depositor's act in seeking restitution from third person to whom, or for benefit of whom, the bank has paid out the deposit, as election of remedy precluding action against bank, 144 A.L.R. 1440.

Notice of rescission as irrevocable election when other party refuses to assent thereto, 1 A.L.R.2d 1084.

Conclusive election of remedies as predicated on commencement of action, or its prosecution short of judgment on the merits, 6 A.L.R.2d 10.

Election to take against will as extinguishing power of appointment, 38 A.L.R.2d 977.

Revocation or withdrawal of election to take under or against will, 71 A.L.R.2d 942.

Factors considered in making election for incompetent to take under or against will, 3 A.L.R.3d 6.

Time within which election must be made for incompetent to take under or against will, 3 A.L.R.3d 119.

Conflict of laws regarding election for or against will, and effect in one jurisdiction of election in another, 69 A.L.R.3d 1081.

23-1-25. Laches.

Equity gives no relief to one whose long delay renders the ascertainment of the truth difficult, even when no legal limitation bars the right.

History. — Orig. Code 1863, § 3027; Code 1868, § 3039; Code 1873, § 3094; Code 1882, § 3094; Civil Code 1895, § 3939; Civil Code 1910, § 4536; Code 1933, § 37-119.

Cross references. — Authority of courts of equity to interpose equitable bar owing to lapse of time and laches of complainant, § 9-3-3. Tolling of limitations due to fraud of defendant or those under whom one claims, § 9-3-96.

JUDICIAL DECISIONS

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General Consideration

Equitable doctrine of laches is not applicable to suits at law. Columbus Bank & Trust Co. v. Dempsey, 120 Ga. App. 5, 169 S.E.2d 349 (1969).

Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence. What is a reasonable time must necessarily depend upon the peculiar facts and environments of the particular case. Parker v. Fisher, 207 Ga. 3, 59 S.E.2d 715 (1950).

If both parties are equally to blame for delay, neither should be allowed to invoke the rule of laches in order to gain advantage over one's adversary. City of McRae v. Folsom, 191 Ga. 272, 11 S.E.2d 900 (1940); Davis v. Newton, 217 Ga. 75, 121 S.E.2d 153 (1961).

Generally, doctrine of laches will be invoked only when there will be prejudice to a party's position. Ansley Park Plumbing & Heating Co. v. Mikart, Inc., 9 Bankr. 144 (Bankr. N.D. Ga. 1981).

Quiet title action. — Trial court did not err in refusing to deny property owners' petition to quiet title due to laches because the owners acquired their property on April 21, 2000, and over the next several years, the owners made repeated requests to adjoining landowners to stop using the street for anything other than access from the owners' driveways to the highway, but the adjoining landowners refused; the adjoining landowners identified no change in circumstance during the intervening years that would qualify as prejudice. Goodson v. Ford, 290 Ga. 662, 725 S.E.2d 229 (2012).

Laches does not apply to uncollected child support. — Judgment forgiving a father's child support arrearage based on the mother's delay in making the claim was reversed because laches does not apply to claims for uncollected child support and the dormancy statute, O.C.G.A. § 9-12-60(a), did not apply to child support orders entered after July 1, 1997, such as the one involved in the case. Wynn v. Craven, 301 Ga. 30, 799 S.E.2d 172 (2017).

Cited in Griffin v. Haden, 172 Ga. 478, 157 S.E. 686 (1931); Freeney v. Pape, 185 Ga. 1, 194 S.E. 515 (1937); Kinney v. Mayor of Milledgeville, 185 Ga. 866, 196 S.E. 467 (1938); Wright v. City of Metter, 192 Ga. 75, 14 S.E.2d 443 (1941); Miller v. Everett, 192 Ga. 26, 14 S.E.2d 449 (1941); Grant v. Hart, 192 Ga. 153, 14 S.E.2d 860 (1941); Gunby v. Turner, 194 Ga. 378, 21 S.E.2d 640 (1942); Lankford v. Holton, 195 Ga. 317, 24 S.E.2d 292 (1943); Williams v. Porter, 202 Ga. 113, 42 S.E.2d 475 (1947); Larkins v. Boyd, 205 Ga. 69, 52 S.E.2d 307 (1949); Calhoun County v. Early County, 205 Ga. 169, 52 S.E.2d 854 (1949); Gay v.

Radford, 207 Ga. 38, 59 S.E.2d 915 (1950); Flannagan v. Clark, 207 Ga. 345, 61 S.E.2d 485 (1950); Barron v. Darden, 207 Ga. 350, 61 S.E.2d 497 (1950); Vinson v. Citizens & S. Nat'l Bank, 208 Ga. 813, 69 S.E.2d 866 (1952); Todd v. Bivins, 215 Ga. 402, 110 S.E.2d 768 (1959); Consumers Fin. Corp. v. Lamb, 218 Ga. 343, 127 S.E.2d 914 (1962); Fuller v. Fuller, 107 Ga. App. 429, 130 S.E.2d 520 (1963); Blackstock v. Murphy, 220 Ga. 661, 140 S.E.2d 902 (1965); Brown v. Granite Holding Corp., 221 Ga. 560, 146 S.E.2d 289 (1965); Fuller v. McBurrows, 229 Ga. 422, 192 S.E.2d 144 (1972); Gauker v. Eubanks, 230 Ga. 893, 199 S.E.2d 771 (1973); Sikes v. Sikes, 231 Ga. 105, 200 S.E.2d 259 (1973); Wilson v. Passmore, 240 Ga. 716, 242 S.E.2d 124 (1978); Sakas v. Jessee, 202 Ga. App. 838, 415 S.E.2d 670 (1992); Troup v. Loden, 266 Ga. 650, 469 S.E.2d 664 (1996); Hall v. Trubey, 269 Ga. 197, 498 S.E.2d 258 (1998); City of Duluth v. Riverbrooke Properties, Inc., 233 Ga. App. 46, 502 S.E.2d 806 (1998); Parker v. Shreve, 244 Ga. App. 350, 535 S.E.2d 332 (2000).

Equitable Demands Must Be Asserted Within Reasonable Time

There is no principle of equity sounder, more conservative and more prolific, in all the fruits of peace, than this: that one who slumbers over one's rights, with no impediment to one's asserting them, until the evidence upon which a counterclaim is founded, may from lapse of time, be presumed to be lost; until the generation cognizant of the transactions between the parties, has passed away, and until original actors are in their graves, and their affairs are left to representatives — the law, in the exercise of an equitable sovereignty, presumes it to be unjust, that under such circumstances, a complainant should be heard; and in nine cases out of ten, it is unjust in fact, as well as in theory. The principle upon which courts of equity proceed in such cases, is, that the lateness of the demand, arising from lapse of time, is presumptive evidence against its justice. Welch v. Welch, 215 Ga. 198, 109 S.E.2d 757 (1959).

Equity will not aid in the enforcement of stale demands. Cannon v. Fulton Nat'l Bank, 206 Ga. 609, 57 S.E.2d 917 (1950); Phillips v. Hayes, 212 Ga. 148, 81 S.E.2d 19 (1956); Welch v. Welch, 215 Ga. 198, 109 S.E.2d 757 (1959).

Defendant's suit is properly barred by laches when defendant's claim of a resulting trust in a house is based on payments made 35 years ago to a person who is the sole record owner and is now dead. Stone v. Williams, 265 Ga. 480, 458 S.E.2d 343 (1995).

Rule that equity will not aid in the enforcement of stale demands applies to accounts. Cannon v. Fulton Nat'l Bank, 206 Ga. 609, 57 S.E.2d 917 (1950).

In a suit to rescind the sale of land, the plaintiff's voluntary failure to bring suit for three years after being fully cognizant of the fraud committed seven years prior thereto is such laches as will bar an action. Hillis v. Clark, 222 Ga. 604, 150 S.E.2d 922 (1966).

When no legal redemption of the land is alleged, or claimed, but the redemption is entirely an equitable one, persons claiming thereunder must assert their equitable demands within a reasonable time, for since equity rewards the vigilant, not the slothful, when the delay is such as to render the ascertainment of the truth difficult, equity will give no relief. Slade v. Barber, 200 Ga. 405, 37 S.E.2d 143 (1946).

Timing of demands against partner in partnership. — Even after the dissolution of a partnership, the statute of limitations does not begin to run in favor of one partner against another until the partnership affairs, as to debtors and creditors of the firm, have been wound up and settled, or, at least, a sufficient time has elapsed since the dissolution to raise the presumption that such was the fact, nor, while there are outstanding assets and liabilities, will a partner be barred as against a copartner, on the principle of stale demands. Powell v. Powell, 171 Ga. 840, 156 S.E. 677 (1931), later appeal, 179 Ga. 817, 177 S.E. 566 (1934).

There is no absolute rule as to what constitutes laches or staleness of demand, and no one decision constitutes a precedent in the strict sense for another. Each case is to be determined according to

Equitable Demands Must Be Asserted Within Reasonable Time (Cont'd)

its own particular circumstances. Laches is not, like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced, an inequity founded on some intermediate change in conditions. Bleckley v. Bleckley, 189 Ga. 47, 5 S.E.2d 206 (1939); Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E.2d 534 (1946).

Laches is not, like limitations, a mere matter of time. but is principally a question of the inequity of permitting the claim to be enforced, an inequity founded on some intermediate change in conditions. Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895 (1945).

Mere lapse of time is usually insufficient to activate the doctrine of laches. Ansley Park Plumbing & Heating Co. v. Mikart, Inc., 9 Bankr. 144 (Bankr. N.D. Ga. 1981).

In determining whether there has been laches, there are various things to be considered, notably the duration of the delay in asserting the claim, and the sufficiency of the excuse offered in extenuation of the delay, whether plaintiff acquiesced in the assertion or operation of the corresponding adverse claim, the character of the evidence by which plaintiff's right is sought to be established, whether during the delay the evidence of the matters in dispute has been lost or become obscured or the conditions have so changed as to render the enforcement of the right inequitable, whether third persons have acquired intervening rights. Citizens' & S. Nat'l Bank v. Ellis, 171 Ga. 717, 156 S.E. 603 (1931); Johnson v. Sears, 199 Ga. 432, 34 S.E.2d 541 (1945); Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895 (1945); Parker v. Fisher, 207 Ga. 3, 59 S.E.2d 715 (1950); Welch v. Welch, 215 Ga. 198, 109 S.E.2d 757 (1959); Erhart v. Brooks, 231 Ga. 272, 201 S.E.2d 464 (1973).

Delay in bringing suit must not be such as to preclude the court from arriving at a safe conclusion as to the truth of the matters in controversy, and thus make the doing of equity either doubtful or impossible, due to loss or obscuration of evidence of the transaction in issue, or when the lapse of time has been sufficient to create or justify a presumption that, if the plaintiff was ever possessed of a right, it had been abandoned, waived, or satisfied. Citizens' & S. Nat'l Bank v. Ellis, 171 Ga. 717, 156 S.E. 603 (1931); Flemister v. Billups, 202 Ga. 132, 42 S.E.2d 376 (1947); Welch v. Welch, 215 Ga. 198, 109 S.E.2d 757 (1959).

Premise behind doctrine of laches. — While most frequently the bar of laches is applied in instances where the long delay has rendered the ascertainment of the truth difficult, the doctrine does not rest on that premise alone. Johnson v. Sears, 199 Ga. 432, 34 S.E.2d 541 (1945).

Delay until death of essential witnesses. — An unreasonable delay until the death of essential witnesses, which practically precludes the court from arriving at a safe conclusion as to the truth of the matters in controversy, and which make the doing of equity either doubtful or impossible, due to loss or obscuration of evidence of the transaction in issue, will bar the action. Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537 (1942).

Death of essential witnesses, which may preclude the court from arriving at a safe conclusion as to the truth of matters in controversy, and which makes the doing of equity doubtful or impossible, will bar the action. Whitfield v. Whitfield, 204 Ga. 64, 48 S.E.2d 852 (1948).

Premise behind doctrine of laches. — While most frequently the bar of laches is applied in instances when the long delay has rendered the ascertainment of the truth difficult, the doctrine does not rest on that premise alone. Bryan v. Willingham-Little Stone Co., 194 Ga. 563, 22 S.E.2d 40 (1942).

18-year delay. — Petition showing affirmatively that the plaintiffs were guilty of laches in not seeking for 18 years the cancellation of deeds conveying property in their mother's estate was properly dismissed on general demurrer (now motion to dismiss). Johnson v. Sears, 199 Ga. 432, 34 S.E.2d 541 (1945).

40 year delay. — A delay of 40 years or more, and the death of essential wit-

nesses, when the truth of matters in controversy cannot be fairly established, makes the doing of equity either doubtful or impossible, and will bar the action. Slade v. Barber, 200 Ga. 405, 37 S.E.2d 143 (1946).

To charge a party with laches in delaying to assert a right, an opportunity to have acted sooner must have existed; if one acted at the first possible opportunity, one is not culpable. Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895 (1945).

In a suit to cancel a deed on the ground of the grantor's insanity, when no reason appeared why the plaintiffs did not know, or by the slightest diligence could not have known, of the substantial facts, so as to bring the suit within a reasonable time after the deed was executed and after the grantor's death, the action was properly dismissed on demurrer (now motion to dismiss) on the ground that it was stale and that the plaintiffs were in laches. Hillis v. Clark, 222 Ga. 604, 150 S.E.2d 922 (1966).

To prevail on a plea of laches, it is essential that the pleading party prove harm caused the pleader by the delay. Clover Realty Co. v. J.L. Todd Auction Co., 240 Ga. 124, 239 S.E.2d 682 (1977).

Delay causing prejudice. — The defendant's plea of laches in a suit brought to enjoin the defendant from extending a parking area onto land zoned for single family dwellings cannot be sustained, when no facts are alleged to show any prejudice to the defendant, or that the ascertainment of the truth is made more difficult by any delay on the part of the plaintiffs to immediately seek relief against the defendant for the unlawful use of the plaintiff's property. Palmer v. Tomlinson, 217 Ga. 399, 122 S.E.2d 578 (1961).

Delay alone is never enough to show laches when there is an applicable statute of limitations. Clover Realty Co. v. J.L. Todd Auction Co., 240 Ga. 124, 239 S.E.2d 682 (1977).

Delay is excusable when it was induced by the adverse party; one cannot take advantage of a delay which one personally has caused or to which one has contributed. City of McRae v. Folsom, 191 Ga. 272, 11 S.E.2d 900 (1940).

Constructive trust denied due to laches. — Former wife was not entitled to impose a constructive trust on her former husband's military pension pursuant to O.C.G.A. § 53-12-132 because she failed to object to the absence of any provision for the pension in their divorce decree for 12 years and failed to bring suit until 5 years after payments allegedly became due. Davis v. Davis, 310 Ga. App. 512, 713 S.E.2d 694 (2011).

Laches Based on Inequity

Laches is not, like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced, an inequity founded on some intermediate change in conditions. Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E.2d 534 (1946); Whitfield v. Whitfield, 204 Ga. 64, 48 S.E.2d 852 (1948).

Laches does not arise from mere lapse of time. Columbus Bank & Trust Co. v. Dempsey, 120 Ga. App. 5, 169 S.E.2d 349 (1969).

In fixing the time when the bar of laches may be interposed, the court does not measure altogether by the lapse of time, because this section declares that: "Equity gives no relief to one whose long delay renders the ascertainment of the truth difficult, though no legal limitation bars the right." Bass v. Mayor of Milledgeville, 180 Ga. 156, 178 S.E. 529 (1934), appeal dismissed, 295 U.S. 721, 55 S. Ct. 926, 79 L. Ed. 1675 (1935).

Laches is an equitable doctrine which is independent of the statute of limitations, and as to the lapse of time necessary for invoking the doctrine of laches, such time may or may not correspond with the time specified in the statute of limitations. Prudential Ins. Co. v. Sailors, 69 Ga. App. 628, 26 S.E.2d 557 (1943); Johnson v. Sears, 199 Ga. 432, 34 S.E.2d 541 (1945).

Courts of equity may act in obedience and analogy to statutes of limitation. — While the equitable doctrine of laches operates independently of any statute of limitations, courts of equity usually act in obedience and in analogy to the

Laches Based on Inequity (Cont'd)

statutes of limitations, in cases when it would not be unjust and inequitable to do so. Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895 (1945).

Lapse of time is an important element of laches; yet, unless a case falls within the operation of a statute of limitations, there is no fixed period within which a person must assert ones claim or be barred by laches; the length of time depends on the circumstances of the particular case. Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895 (1945).

Period from which laches is determined is fixed in equity cases according to the circumstances of each case. Bryan v. Willingham-Little Stone Co., 194 Ga. 563, 22 S.E.2d 40 (1942).

Equity can interpose equitable bar. — The doctrine of laches not only forbids relief to one whose long delay renders the ascertainment of truth difficult, though no legal limitation bars the right, but also authorizes equity to interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce the party's legal rights. Goodwin v. First Baptist Church, 225 Ga. 448, 169 S.E.2d 334 (1969), later appeal, 226 Ga. 524, 175 S.E.2d 868 (1970).

Claimants barred by laches. — In an equitable suit to obtain possession of lands, under a rule analogous to the rule of law permitting title by adverse possession to be acquired in seven years under color of title, claimants would be barred after such time by their laches. Slade v. Barber, 200 Ga. 405, 37 S.E.2d 143 (1946).

Equitable petition seeking cancellation of deed. — On an equitable petition seeking merely a cancellation of a deed, although "equity follows the analogy of the law" in allowing the seven-year period of limitation, this time is permitted only if there are no special circumstances demanding an earlier application, and when such circumstances exist, calling for an interposition of the equitable doctrine of laches, equity will refuse relief to one whose long delay renders the ascertainment of the truth difficult, though no legal limitation bars the right. Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537 (1942).

The rules of limitation do not apply if the defendant, or those under whom the defendant claims, has been guilty of a fraud by which the plaintiff shall have been debarred or deterred from the plaintiff's action. In such a case, the period of limitation shall run only from the time of the discovery of the fraud, and equity applies a similar rule as to laches. Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537 (1942).

The statute of limitations is a statute of repose. When a person is defrauded, and has knowledge of the fraud, the person must ask redress, if at all, within the period of limitation. If the person waits for a longer period, the person is bound by laches. Slade v. Barber, 200 Ga. 405, 37 S.E.2d 143 (1946).

Fraud is not good reply to statute of limitations. — Fraud, which should have been discovered if usual and reasonable diligence had been exercised, is not a good reply to the statute of limitations. Slade v. Barber, 200 Ga. 405, 37 S.E.2d 143 (1946).

A general allegation of fraud amounts to nothing. — It is necessary that the complainant show, by specifications, wherein the fraud consists in order to prevent the application of laches against the complainant. Issuable facts must be charged. Welch v. Welch, 215 Ga. 198, 109 S.E.2d 757 (1959).

Measure of delay. — Period of the delay in bringing suit to decide if it is barred by laches is measured from the time the cause of action was possessed by the party charged with laches or the party's privies. Chapman v. McClelland, 248 Ga. 725, 286 S.E.2d 290 (1982).

Pleading and Practice

Defense of laches must be alleged. — A petition is not demurrable (now subject to motion to dismiss) on the ground of laches on the part of the petitioner, when nothing in the petition authorizes the inference that there was any delay on the petitioner's part, suit being brought within the statute of limitations, which rendered the ascertainment of the truth more difficult, or in any way hindered the defendant city in making its defense. Vickers v. City of Fitzgerald, 216 Ga. 476, 117 S.E.2d 316 (1960), overruled on other

grounds, City of Chamblee v. Maxwell, 264 Ga. 635, 452 S.E.2d 488 (1994).

Laches is an equitable defense, and a petition for equitable relief is not subject to demurrer (now motion to dismiss) on the ground of laches unless the allegations of fact affirmatively show such defense. Henderson v. Henderson, 219 Ga. 310, 133 S.E.2d 251 (1963).

Plaintiff must prove absence of laches. — It is incumbent on the plaintiff, in order to repel the presumption of unreasonable delay, to allege in the plaintiff's petition the impediments to an earlier prosecution of the plaintiff's claim. Parker v. Fisher, 207 Ga. 3, 59 S.E.2d 715 (1950).

When the petition affirmatively shows that there has been unusual and unreasonable delay in bringing the action, it is incumbent upon the plaintiffs to show that the plaintiff were not guilty of laches. Hillis v. Clark, 222 Ga. 604, 150 S.E.2d 922 (1966).

When it cannot be said as a matter of law that the plaintiff was dilatory in asserting the plaintiff's claim, then the defense of laches is a question for the jury and summary judgment cannot be granted the defendant on the issue. Davidson Mineral Properties, Inc. v. Gifford-Hill & Co., 235 Ga. 176, 219 S.E.2d 133 (1975).

Application to mandamus. — Supreme Court of Georgia concluded that case law supporting that a mandamus action can be barred by gross laches is the correct rule; thus, Crow v. McCallum, 215 Ga. 692, 696 (113 SE 203) (1960), and its progeny, were wrongly decided and overruled. Marsh v. Clarke County Sch. Dist., 292 Ga. 28, 732 S.E.2d 443 (2012).

Plaintiff's right to recover plaintiff's share of the remainder estate is a plain statutory right not subject to the bar of laches. Perkins v. First Nat'l Bank, 221 Ga. 82, 143 S.E.2d 474 (1965).

One in possession of land is not chargeable with laches in failing to bring suit to cancel deeds. Marietta Realty & Dev. Co. v. Reynolds, 189 Ga. 147, 5 S.E.2d 347 (1939); Davis v. Newton, 217 Ga. 75, 121 S.E.2d 153 (1961).

One who is in possession of property under a claim of ownership will not be guilty of laches for delay in resorting to a court of equity to establish one's rights. Davis v. Newton, 215 Ga. 58, 108 S.E.2d 809 (1959).

Affirmative defense relevant. — Trial court's denial of a decedent's father's motion for partial summary judgment pursuant to O.C.G.A. § 9-11-56 in an action against the decedent's mother and the estate administrator was proper, because the defense of laches under O.C.G.A. § 23-1-25 was appropriate in defense of the father's request for imposition of a constructive trust on an annuity that was purchased with the wrongful death settlement proceeds, and the defense of advice of counsel under O.C.G.A. § 15-19-17 against the father's claim of breach of fiduciary duty was relevant to the mother's state of mind. Rhone v. Bolden, 270 Ga. App. 712, 608 S.E.2d 22 (2004).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 93, 152 et seq., 159 et seq.

C.J.S. — 30 C.J.S., Equity, § 100. 31 C.J.S., Equity, § 113 et seq.

ALR. — Laches as affecting right of corporation or its stockholders to relief against directors for violations of trust, 10 A.L.R. 370.

Laches as preventing recovery of property diverted from one religious sect or denomination to another, 18 A.L.R. 692.

Check in payment of interest or installment of principal as tolling statute of limitations, 28 A.L.R. 84; 125 A.L.R. 271.

Institution of suit as relieving one of charge of laches precluding relief in equity, 43 A.L.R. 921.

Effect of recovery of judgment on unfiled or abandoned claim after expiration of time allowed for filing claim against estate, 60 A.L.R. 736.

What amounts to laches or delay on part of wife or widow in attacking antenuptial settlement which will prevent relief, 74 A.L.R. 559.

Right to equitable relief from usury as affected by laches, 111 A.L.R. 126.

Applicability of statute of limitations or

doctrine of laches as between husband and wife, 121 A.L.R. 1382.

Statute of limitations or presumption of payment from lapse of time as ground for affirmative relief from debt or lien, 164 A.L.R. 1387.

Workers' compensation: time and jurisdiction for review, reopening, modification, or reinstatement of award or agreement, 165 A.L.R. 9.

Pleading laches, 173 A.L.R. 326.

Delay of stockholders in exercising their right to convert their stock into other class of stock or corporate obligation, 10 A.L.R.2d 587.

Applicability of statute of limitations or laches to quo warranto proceedings, 26 A.L.R.2d 828.

Laches as precluding cancellation of or other relief against release for personal injuries, 34 A.L.R.2d 1314.

What constitutes sufficient repudiation of express trust by trustee to cause statute of limitations to run, 54 A.L.R.2d 13.

Delay in asserting contractual right to arbitration as precluding enforcement thereof, 25 A.L.R.3d 1171.

Estoppel or laches precluding lawful spouse from asserting rights in decedent's estate as against putative spouse, 81 A.L.R.3d 110.

Applicability of statute of limitations or doctrine of laches to proceeding to revoke or suspend license to practice medicine, 51 A.L.R.4th 1147.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 A.L.R.5th 233.

CHAPTER 2

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ARTICLE 1

GENERAL PROVISIONS

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JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Code Section 23-2-1, repealed in 1986, are included in the annotations for this article.

Equity may set aside a void judgment, where diligence is proven. Norris v. Pollard, 75 Ga. 358 (1885).

Judgment cannot be attacked collaterally. Fricks v. Miller, 41 Ga. 274 (1870).

Judgment cannot be attacked collaterally even if procured through accident or mistake. Brooke v. F & M Bank, 27 Ga. App. 250, 108 S.E. 135 (1921).

A court of equity will not lend its aid to a party to a contract founded upon an illegal or immoral consideration; if the contract is executed, it will be left to stand, and if it be executory, neither party can enforce it. Fender v. Crosby, 209 Ga. 896, 76 S.E.2d 769 (1953).

Equitable relief requires showing of inadequate remedy at law. — One invoking equitable relief against verdicts, as well as against judgments, should meet the usual requirement as to showing that his relief at law would be less adequate than his relief at equity. Gentle v. Georgia Power Co., 179 Ga. 853, 177 S.E. 690 (1934).

Equitable interference after verdict at law prohibited except in cases of fraud, etc. — The general rule is, that courts will not interfere after verdict at law, except in cases of fraud, or surprise, or in extraordinary cases where manifest injustice would be done; nor where the party might have defended himself fully at law and neglected it. Poole v. McEntire, 209 Ga. 659, 75 S.E.2d 20 (1953).

A person is generally committed to the contents of an instrument which he signs, even though he did not have actual knowledge thereof, in the absence of fraud or some other circumstances relieving him of the imputation of inexcusable indifference or neglect. Bach v. Phillips, 200 Ga. 308, 37 S.E.2d 407 (1946).

Absence of counsel, when caused by illness may be sufficient ground to set aside a judgment. Clark v. Ramsay, 138 Ga. 726, 75 S.E. 1128 (1912).

Absence of a party may be sufficient grounds for setting aside a judgment. McCall v. Miller, 120 Ga. 262, 47 S.E. 920 (1904).

General rule that an infant is bound by a judgment rendered in a suit in which he is represented by a next friend, to the same extent as though he were an adult, is subject to an exception in case of fraud, collusion, or like conduct on the part of the next friend, in which case the judgment may be set aside at the instance of the minor, even though it may be a consent judgment. Nelson v. Estill, 190 Ga. 235, 9 S.E.2d 73 (1940).

A decree adversely affecting the interests of minors, even though it be entered by consent of their father as next friend, may, if induced by fraud, duress, or the like, be set aside at their instance in a proper proceeding, and for that purpose they may sue by their mother as next friend. Nelson v. Estill, 190 Ga. 235, 9 S.E.2d 73 (1940).

Judgment taken in absence of party pursuant to agreed on continuance. — When the parties agreed to continue the case, and for this reason a party fails to appear, one may have a judgment thus taken set aside. Southern Ry. v. Planters Fertilizer Co., 134 Ga. 527, 68 S.E. 95 (1910).

Affidavit of illegality is not proper remedy to arrest execution and set aside judgment by default. Tumlin v. O'Bryan & Bros., 68 Ga. 65 (1881).

Affidavit of illegality is not proper remedy for judgment procured by fraud. Ray v. Hixon, 107 Ga. 768, 33 S.E. 692 (1899).

Cited in Bryant v. Bush, 165 Ga. 252, 140 S.E. 366 (1927); Ellis v. Ellis, 174 Ga. 559, 163 S.E. 155 (1932); Walker v. Hall, 176 Ga. 12, 166 S.E. 757 (1932); Nolan v. Southland Loan & Inv. Co., 177 Ga. 59, 169 S.E. 370 (1933); Huson Ice & Coal Co. v. City of Covington, 178 Ga. 6, 172 S.E. 56 (1933); Jackson Disct. Co. v. Merck, 178 Ga. 660, 173 S.E. 647 (1934); Lovelace v. Lovelace, 179 Ga. 822, 177 S.E. 685 (1934); Gentle v. Georgia Power Co., 179 Ga. 853, 177 S.E. 690 (1934); Stroup v. Imes, 185 Ga. 422, 195 S.E. 411 (1938); Haygood v. Haygood, 190 Ga. 445, 9

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S.E.2d 834 (1940); Hadden v. Willingham Auto. Fin. Corp., 67 Ga. App. 444, 20 S.E.2d 436 (1942); Bainbridge Farm Co. v. Bower, 194 Ga. 304, 21 S.E.2d 224 (1942); Rucker v. Upshaw, 199 Ga. 529, 34 S.E.2d 602 (1945); Hanleiter v. Spearman, 200 Ga. 289, 36 S.E.2d 780 (1946); Morris Plan Bank v. Simmons, 201 Ga. 157, 39 S.E.2d 166 (1946); Saliba v. Saliba, 202 Ga. 279, 42 S.E.2d 748 (1947); Hogg v. Hogg, 206 Ga. 691, 58 S.E.2d 403 (1950); Conway v. Gower, 208 Ga. 348, 66 S.E.2d 740 (1951); Poole v. McEntire, 209 Ga. 659, 75 S.E.2d 20 (1953); Johnson v. Johnson, 210 Ga. 795, 82 S.E.2d 831 (1954); Nuckolls v. Merritt, 216 Ga. 35, 114 S.E.2d 427 (1960); Hester v. Dixie Fin. Corp., 109 Ga. App. 204, 135 S.E.2d 504 (1964); Tripp v. Conner, 220 Ga. 2, 136 S.E.2d 744 (1964); Tucker v. Tucker, 221 Ga. 128, 143 S.E.2d 639 (1965); Saturday v. Saturday, 113 Ga. App. 251, 147 S.E.2d 798 (1966); Echols v. Tower Credit Corp., 223 Ga. 307, 154 S.E.2d 617 (1967); McSherry v. Israel, 223 Ga. 472, 156 S.E.2d 33 (1967); Kitchens v. Clay, 224 Ga. 325, 161 S.E.2d 828 (1968); Northern Freight Lines v. Fireman's Fund Ins. Cos., 121 Ga. App. 786, 175 S.E.2d 104 (1970); Lewis v. Lewis, 124 Ga. App. 579, 184 S.E.2d 672 (1971); Aetna Fin. Co. v. Pair, 141 Ga. App. 243, 233 S.E.2d 218 (1977); Wilson v. Passmore, 240 Ga. 716, 242 S.E.2d 124 (1978); Cooper v. Mesh, 247 Ga. 82, 274 S.E.2d 335 (1981).

Negligence

Before equity will interfere to grant relief against a judgment at law, three things must concur: ignorance of the defense sought to be set up at the time the judgment at law was rendered, without negligence being imputable to the complainant, and a want of adequate relief at law. Beddingfield v. Old Nat'l Bank & Trust Co., 175 Ga. 172, 165 S.E. 61 (1932).

There is no relief from a judgment that could have been prevented but for the negligence of the party. Beddingfield v. Old Nat'l Bank & Trust Co., 175 Ga. 172, 165 S.E. 61 (1932).

Equity will not reward negligence. — Where a defendant in a pending lawsuit negligently fails to make his defense, equity will not intervene to grant him any relief from a judgment obtained against him in consequence of his negligence. West v. Downer, 218 Ga. 235, 127 S.E.2d 359 (1962); Stratton v. Bingham, 238 Ga. 287, 232 S.E.2d 560 (1977).

When a party moving to set aside a judgment, during the term it was rendered, has been legally served with the suit and does not show that an alleged fraud practiced on him by the defendant prevented him from making his defense and having his day in court, it is beyond a court's power to grant the motion. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961).

Negligence in probating a will. — Equity will not intervene to set aside a judgment of a court of competent jurisdiction, which might have been prevented except for the negligence of the complaining party. W.T. Rawleigh Co. v. Seagraves, 178 Ga. 459, 173 S.E. 167 (1934).

If a party has a good defense at law, and from negligence fails to set it up at the proper time, he must take the consequences of his own laches; he cannot go into equity to be relieved from the consequences of such negligence. Peacock v. Walker, 213 Ga. 628, 100 S.E.2d 575 (1957).

As qualification of the rule controlling the setting aside of judgments or prerequisites to its exercise it must appear that it was not due to defendant's negligence that the fraud was perpetrated, and that due diligence would not have prevented the fraud. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962).

To authorize setting aside a judgment after the term at which it was rendered, the actions of the adverse party that cause a party's failure to appear and defend must be of such character to show that reliance on them did not amount to laches or negligence. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962).

The judgment probating a will in solemn form cannot be set aside on any ground which by due diligence could have been ascertained and pleaded as a defense

against probate. Smith v. Smith, 225 Ga. 799, 171 S.E.2d 524 (1969).

Failure to attend trial. — The failure of a defendant to attend and defend a suit against him cannot be relieved in equity upon the ground that he was advised by his attorney that the case would not be tried until a later term, where it is merely shown that such advice was based upon an incorrect and unwarranted assumption that the remainder of the term would be devoted to the trial of criminal cases. In such a case the erroneous assumption on the part of the attorney would be imputable to the client, and would afford no equitable ground for excusing his absence. W.T. Rawleigh Co. v. Seagraves, 178 Ga. 459, 173 S.E. 167 (1934).

When an administrator was sued upon an instrument alleged to have been executed by his intestate, and he did not know the instrument to be genuine, he should have exercised diligence to determine this fact before permitting judgment against him, and, where he knew or had reasonable cause to believe that the instrument would be introduced in evidence at the trial upon another defense which he had filed, when he would have a sufficient opportunity to discover the truth as to its genuineness, and he failed to avail himself of this opportunity and was absent from the trial only because of an unwarranted assumption by his attorney as to the time when the case would be tried, with the result that judgment was rendered against him, he cannot obtain the aid of a court of equity to set aside the judgment upon the ground that the instrument was a forgery and that he was ignorant of this defense at the time the judgment was rendered. In such case the failure to discover the defense before judgment cannot be accounted as an accident or misfortune, but is chargeable to the defendant as negligence, barring any claim for relief in equity. W.T. Rawleigh Co. v. Seagraves, 178 Ga. 459, 173 S.E. 167 (1934).

Where a wife voluntarily signed an acknowledgment of service and waiver of process with respect to a suit for divorce that was later to be prepared and filed against her by her husband, and after having signed such acknowledgment and waiver, left the state and made no investigation whatever as to the contents of the suit, which, as filed sought not only a divorce but also custody of the minor child of the parties, with judgment rendered accordingly as to both matters in favor of the husband, the wife's petition in equity to set aside the judgment showed such negligence on the part of the wife in failing to acquaint herself with the contents of the suit as to bar her right to equitable relief sought, and the court did not err in dismissing the petition despite the wife's allegation that there was a breach of an agreement by the husband that he would not seek custody in the suit. Bach v. Phillips, 200 Ga. 308, 37 S.E.2d 407 (1946).

Setting aside Workers' Compensation ruling. — In order to set aside an award of the full workmen's compensation board (now Board of Workers' Compensation) which was entered pursuant to an agreement between the parties, because of fraud, accident or mistake, this fraud, accident or mistake is the same as is set forth in this section, and is not available where the person seeking to set aside the award has been guilty of fraud or negligence himself. Where an agreement signed by the claimant which is said to have been procured by fraud stated not only that the claimant did not suffer an injury which arose out of and in the course of her employment, but stated that she was not entitled to any compensation, such language being clear and understandable and it is not alleged that the claimant was prohibited from reading such agreement or that she did not read it, therefore, it must be concluded that the claimant was either negligent in failing to read such agreement or that she was negligent in signing it if some part of it was untrue and she had read it. McCord v. Employers Liab. Assurance Corp., 96 Ga. App. 35, 99 S.E.2d 327 (1957).

Failure to attend trial. — Equity will not set aside judgment on the ground that a party and his attorney were prevented from attending the court by a statement previously made to them by the justice of the peace that case would not be tried on date actually set, but on the next day absent fraud on the opposite party or his counsel and any meritorious defense

Negligence (Cont'd)

against the recovery had by the verdict. Dorsey v. Griffin, 173 Ga. 802, 161 S.E. 601 (1931).

Negligent delay in seeking to set judgment aside. — When the complainants negligently allowed three years to pass without seeking to set aside the judgment complained of at law, equity will not grant them any relief. Field v. Jordan, 124 Ga. 685, 52 S.E. 885 (1906).

When failure to secure witnesses was due to negligence, equity will not grant relief. McCaulis v. Duval, 69 Ga. 744 (1882).

Equity will not, by injunction, restrain the enforcement of a judgment when the defendant had notice of such judgment within the period of limitations, and negligently failed to take any action to have such judgment vacated or set aside within the time provided by law. Turner v. Avant, 205 Ga. 426, 54 S.E.2d 269 (1949).

Fraud

Fraud generally. — Fraud in the procurement of a judgment to be set aside must have been actual and positive, done with knowledge, and not merely constructive fraud, committed in ignorance of the true facts. Rivers v. Alsup, 188 Ga. 75, 2 S.E.2d 632 (1939).

Deceitful practices in depriving or endeavoring to deprive another of his known right by means of some artful device or plan contrary to plain rules of common honesty constitute fraud. By this term is meant fraud perpetrated by some artifice or contrivance of the party or person benefited, whereby in the course of the trial, or in entering judgment, the injured party or the court has been imposed upon or betrayed into inattention or deceived. Johnson v. Bogdis, 205 Ga. 535, 54 S.E.2d 620 (1949), later appeal, 207 Ga. 650, 63 S.E.2d 658 (1951).

The word fraud may be construed to include duress. Duress is but a species of fraud where one is induced contrary to one's will from presenting a defense to a suit. Frost v. Frost, 235 Ga. 672, 221 S.E.2d 567 (1975).

To determine whether equity will set aside award for fraud, former Code 1933, §§ 37-111 and 37-709 (see O.C.G.A. §§ 23-1-20 and 23-2-60) must be construed together. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933).

The judicial power to set aside a judgment for fraud is recognized. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961).

The power to set aside a judgment for fraud may be exercised by courts having equity jurisdiction when proper grounds are shown. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961).

A federal district court could set aside for fraud a judgment of the court of ordinary (now probate court) discharging a guardian. Park v. Park, 37 F. Supp. 185 (N.D. Ga. 1941), later appeal, 123 F.2d 370 (5th Cir. 1941).

A proceeding to set aside for fraud a judgment of a court of ordinary (now probate court) discharging a guardian is authorized and could be maintained in the superior courts of the State of Georgia, and this without recourse to the court of ordinary which granted the judgment of discharge. Park v. Park, 37 F. Supp. 185 (N.D. Ga. 1941).

Party must be vigilant to detect fraud. One who has been negligent and inactive cannot obtain relief. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962).

Fraud must be specifically alleged. — While a court of equity in a proper case will set aside a judgment which is procured by fraud, such fraud must be one other than false and untrue testimony. Hutchings v. Roquemore, 171 Ga. 359, 155 S.E. 675 (1930).

To set aside an award for fraud, it is not sufficient to state the fraud in general terms, but such facts of fraud must be so stated that the court may see the illegality. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933).

When a party moving to set aside a judgment, during the term it was rendered, has been legally served with the suit and does not show that an alleged fraud practiced on him by the defendant prevented him from making his defense

and having his day in court, it is beyond a court's power to grant the motion. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961).

Fraud authorizing setting aside a judgment must come from the adverse party. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933).

While a court of equity has authority to annul and set aside a judgment obtained by fraud, accident or mistake, it must be made to appear in an action therefor, where fraud is claimed, that the fraud was perpetrated by the adverse party, his counsel or agent. Pike v. Andrews, 210 Ga. 553, 81 S.E.2d 817 (1954).

Fraud that will authorize equity to set aside an award is fraud extrinsic or collateral to the matter tried by the first court, and not a fraud which was in issue in that suit; or it must be fraud or deception practiced on the unsuccessful party, by which he was prevented from exhibiting fully his case, and by which there has never been a real contest before court on the subject matter of the suit. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933); Pike v. Andrews, 210 Ga. 553, 81 S.E.2d 817 (1954).

Before fraud will authorize a court of equity to vacate and set aside a judgment of a court having jurisdiction, it must appear that the fraud complained of was perpetrated by the prevailing party, his attorney or his agents. Poole v. McEntire, 209 Ga. 659, 75 S.E.2d 20 (1953); Pike v. Andrews, 210 Ga. 553, 81 S.E.2d 817 (1954).

Frauds for which the court may set aside a former judgment between the same parties do not include fraud in procuring a judgment by false testimony unless it is shown, among other things, that the witness has been convicted of perjury. Elliott v. Marshall, 182 Ga. 513, 185 S.E. 831 (1936).

A court of equity will not set aside a judgment, although obtained by willful and corrupt perjury, unless it appears that the perjurer has been convicted of such perjury, and unless it appears that a judgment could not have been rendered without the perjured testimony. Hutchings v. Roquemore, 171 Ga. 359, 155 S.E. 675 (1930).

Misrepresentation is one of the grounds on which equitable relief may be invoked in regard to judgments. Johnson v. Bogdis, 205 Ga. 535, 54 S.E.2d 620 (1949), later appeal, 207 Ga. 650, 63 S.E.2d 658 (1951).

Misled, non-negligent party can have judgment set aside. — When one party does give the other assurances upon which the party can reasonably rely, that the suit will be dismissed or judgment will not be taken, and then procures a judgment taking advantage of the trust and confidence of the other party, the party misled, who is not negligent, has a ground to set aside the judgment. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962).

Setting aside judgment based on counsel's action. — A petition in equity seeking to set aside a judgment dismissing petitioner's suit at law on general demurrer (now motion to dismiss), by consent of one of petitioner's attorneys and counsel for defendant, on the ground of false representations made by defendant's counsel to induce petitioner's counsel to consent to the judgment, which failed to allege that petitioner's counsel consented to the judgment in violation of express instructions of which the defendant or her counsel had notice or knowledge, failed to set forth a cause of action for equitable relief, and it was not error to dismiss the petition on general demurrer (now motion to dismiss). Pike v. Andrews, 210 Ga. 553, 81 S.E.2d 817 (1954).

Effect of fraud perpetrated by third-party stranger. — One who has obtained a judgment at law and who is not chargeable with fraud, will not be interfered with by a court of equity for the mere reason that a stranger perpetrated a fraud which prevented the other party to the judgment from interposing a defense. Beddingfield v. Old Nat'l Bank & Trust Co., 175 Ga. 172, 165 S.E. 61 (1932).

One who has obtained a judgment at law according to the prescribed method, and who is not chargeable with any conduct which would amount to fraud or imposition upon the adverse party in relation to the judgment, will not be interfered with by a court of equity for the mere

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reason that a stranger perpetrated a fraud which prevented the other party to the judgment from interposing a defense. Pike v. Andrews, 210 Ga. 553, 81 S.E.2d 817 (1954).

Mere failure of a party to disclose to the court or to the party's adversary matters which would defeat the party own claim or defense is not such fraud as will justify or require a vacation of the judgment. Buice v. T. & B. Bldrs., Inc., 219 Ga. 259, 132 S.E.2d 784 (1963).

Suppression of a material fact may constitute fraud such as will justify equity to set aside judgment obtained by it. Capital Bank v. Rutherford, 70 Ga. 57 (1883).

Fraud must be committed on complainant, or on complainant's agent. Mahan v. Cavender, 77 Ga. 118 (1886); Lanier v. Nunnally & Co., 128 Ga. 358, 57 S.E. 689 (1907).

Setting aside fraudulent registration of title to land. — In cases of fraud or forgery, the decree registering title in the name of an applicant for registration is not a bar to a proceeding by the true owner to set aside such registration, if he moves in seven years. Rock Run Iron Co. v. Miller, 156 Ga. 136, 118 S.E. 670 (1923).

Mistake of Fact

Allegations of mistake of fact constitute cause of action to set aside judgment. — Where, due to a mistake of fact unmixed with negligence, the condemnation proceeding for a public road was conducted throughout upon the theory that the road would be paved at approximately grade level, thus improving rather than damaging the remaining abutting property, and there was nothing to indicate that a fill of from 25 to 40 feet would be made in front of the remaining property which would damage it in the amount of approximately $20,000.00, a petition in equity, alleging these facts and alleging that the mistake prevented the owners from proving this consequential damage, alleged a cause of action to set aside the award and the judgment of condemnation and to recover the full damages. Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

Acceptance of disqualified jurors, due to the fact that they failed to report their relationship to plaintiff, amounts to such a mistake as will authorize a court of equity to set aside the verdict rendered in the law court and order a new trial. Gulf Ref. Co. v. Miller, 151 Ga. 721, 108 S.E. 25 (1921).

Duress

Allegations of duress as acceptable basis to set judgment aside. — A party who has been prevented by duress from defending a suit against him may be relieved from the judgment. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961).

Ignorance Generally

Ignorance insufficient as basis to set judgment aside. — A judgment will not be set aside in a court of equity on the ground that the defendant had a good defense of which he was entirely ignorant, unless it appears that his ignorance of such defense and his failure to assert it were unmixed with any fault or negligence on his part. W.T. Rawleigh Co. v. Seagraves, 178 Ga. 459, 173 S.E. 167 (1934).

A person who, through ignorance, allows a judgment to go against him, cannot afterwards have it set aside, even on the ground of fraud, if he himself has not exercised ordinary diligence in the premises. Hoke v. Walraven, 57 Ga. App. 106, 194 S.E. 610 (1937).

A court will not relieve against a judgment at law, unless the defendant in the judgment can show he had a good defense of which he was entirely ignorant while the suit at law was pending against him; or unless he was prevented from availing himself of his defense, by fraud, or accident, or the act of the adverse party, unmixed with negligence, or fault on his part. Felker v. Johnson, 189 Ga. 797, 7 S.E.2d 668 (1940).

Failure to Present Meritorious Defense

Presentation of meritorious defense required. — Where petition fails

to allege that petitioner had filed a meritorious defense to the case in which judgment was rendered against him in the justice court, a court will not interfere to set aside such judgment. Dorsey v. Griffin, 173 Ga. 802, 161 S.E. 601 (1931).

When no defense was offered, equity will not grant relief. Cohen v. Meador, 137 Ga. 551, 73 S.E. 749 (1912); Garrett v. Thornton, 157 Ga. 487, 121 S.E. 820 (1924).

When defendant negligently fails to make his defense, equity will not grant any relief. Cleckley v. Beall, Spears & Co., 37 Ga. 583 (1868); Redwine v. McAfee, 101 Ga. 701, 29 S.E. 428 (1897); Graham v. Graham, 137 Ga. 668, 74 S.E. 426 (1912).

Two things are required to constitute a meritorious bill in equity to set aside a judgment rendered in a court having jurisdiction on account of accident, mistake or fraud: first, that the complainant had a good defense to the action at law; and secondly, that the failure to make that defense there was owing, not to any negligence or fault in the complainant, but to fault of the defendants or their attorney. Russell v. Hoge, 217 Ga. 814, 125 S.E.2d 648 (1962).

Requirement to plead meritorious defense. — In equitable proceedings to set aside a judgment rendered in a court of law on account of accident, mistake, or fraud, the plaintiff is required to set out a meritorious defense to the action in which he seeks to set aside the judgment. This does not mean that, in a direct equitable proceeding to set aside a judgment of a court of ordinary or a court of law on the ground that such court or courts had no jurisdiction of the subject matter or of the person, and that said judgment is void, it is necessary to plead a meritorious defense. Foster v. Foster, 207 Ga. 519, 63 S.E.2d 318 (1951).

Mere failure to make a defense affords no grounds to set aside an award. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933).

A judgment obtained against an executor cannot be set aside in equity by legatees on ground that there was a good defense which executor failed to set up, unless it be also shown that there was accident, mistake, fraud, or corrupt complicity between executor and plaintiff. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933).

To have a judgment set aside, a plaintiff must have a good defense of which he was entirely ignorant, or he must be prevented from making the defense because of fraud or accident, or the act of the adverse party, unmixed with fraud or negligence on his own part. The allegation that the plaintiff had no notice that he was being sued is not sufficient ground to set aside the judgment, the opposite party having complied with the law as to service. Milam v. Busey, 96 Ga. App. 88, 99 S.E.2d 325 (1957).

Failure to plead equitable defense in city court. — A judgment of a city court will not be set aside merely because the defendant failed to plead his equitable defenses thereto. Gentle v. Atlas Sav. & Loan Ass'n, 105 Ga. 406, 31 S.E. 544 (1898).

What plaintiff must prove. — Plaintiff must prove that he exercised due diligence, and the manner that his omission to assert his defense occurred. Simmons v. Martin, 53 Ga. 620 (1875).

Plaintiff must prove that he has a good defense. Clark v. Ramsey, 143 Ga. 729, 85 S.E. 869 (1915).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 224, 244, 251.

C.J.S. — 31 C.J.S., Equity, § 622 et seq.

ALR. — Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 A.L.R.2d 1179.

Right of successful party to have judgment in his favor vacated or set aside on grounds of mistake, inadvertence, excusable neglect, or the like, 40 A.L.R.2d 1127.

Appealability of order vacating, or refusing to vacate, approval of settlement of infant's tort claim, 77 A.L.R.2d 801.

Consent as ground of vacating judgment, or granting new trial, in civil case,

after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Liability insurer's right to open or set aside, or contest matters relating to merits of, judgment against insured, entered in action in which insurer did not appear or defend, 27 A.L.R.3d 350.

Fraud in obtaining or maintaining default judgment as ground for vacating or setting aside in state courts, 78 A.L.R.3d 150.

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747.

23-2-1. When equity will set aside judgment.

Reserved. Repealed by Ga. L. 1986, p. 294, § 3, effective March 26, 1986.

Editor's notes. — This Code section was based on Orig. Code 1863, § 3062; Code 1868, § 3074; Code 1873, § 3129; Code 1882, § 3129; Civil Code 1895, § 3988; Civil Code 1910, § 4585; Code 1933, § 37-220.

RESEARCH REFERENCES

ALR. — Right of infant to set aside consent judgment in action for personal injuries, 20 A.L.R. 1249.

Nonresidence of one or both parties as affecting jurisdiction of court of suit or proceeding to annul divorce decree rendered in same state, 33 A.L.R. 469.

Mental incompetency at the time of rendition of judgment in civil action as ground of attack upon it, 34 A.L.R. 221; 140 A.L.R. 1336.

Criterion of extrinsic fraud as distinguished from intrinsic fraud, as regards relief from judgment on ground of fraud, 88 A.L.R. 1201.

Retention of jurisdiction in suit in equity to determine whole controversy, including amount of loss or damage, after setting aside an award or finding by arbitrators or appraisers, 112 A.L.R. 9.

'Rightness' of judgment as open for consideration in suit in equity to complete or effectuate it, 139 A.L.R. 1507.

Constructive service of process in action against nonresident to set aside judgment, 163 A.L.R. 504.

Misinformation by judge or clerk of court as to status of case or time of trial or hearing as ground for relief from judgment, 164 A.L.R. 537.

Power of successor judge taking office during termtime to vacate, etc., judgment entered by his predecessor, 11 A.L.R.2d 1117.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 A.L.R.2d 1179.

Right of successful party to have judgment in his favor vacated or set aside on grounds of mistake, inadvertence, excusable neglect, or the like, 40 A.L.R.2d 1127.

Appealability of order vacating, or refusing to vacate, approval of settlement of infant's tort claim, 77 A.L.R.2d 801.

Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Liability insurer's right to open or set aside, or contest matters relating to merits of, judgment against insured, entered in action in which insurer did not appear or defend, 27 A.L.R.3d 350.

Fraud in obtaining or maintaining default judgment as ground for vacating or setting aside in state courts, 78 A.L.R.3d 150.

23-2-2. Setting aside sale or contract for inadequate consideration.

Great inadequacy of consideration, joined with great disparity of mental ability in contracting a bargain, may justify equity in setting aside a sale or other contract.

History. — Orig. Code 1863, § 3110; Code 1868, § 3122; Code 1873, § 3179; Code 1882, § 3179; Civil Code 1895, § 4033; Civil Code 1910, § 4630; Code 1933, § 37-710.

Cross references. — For further provisions regarding inadequacy of consideration, see § 13-3-46.

Law reviews. — For article discussing effect of contracts involving fraud or inadequate consideration, see 4 Ga. L. Rev. 469 (1970).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability of Section
Inadequate Consideration and Mental Disparity Generally
1. In General
2. Fraud
3. Insanity
4. Weakness of Mind
5. Grief
6. Intoxication
Valuation of Consideration
Pleading and Practice

General Consideration

Cited in Thompson v. Thompson, 190 Ga. 264, 9 S.E.2d 80 (1940); Armour v. Lunsford, 192 Ga. 598, 15 S.E.2d 886 (1941); Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385 (1942); Jones v. Hogans, 197 Ga. 404, 29 S.E.2d 568 (1944); Scott v. Gillis, 202 Ga. 220, 43 S.E.2d 95 (1947); Johnson v. Boyd, 202 Ga. 531, 43 S.E.2d 524 (1947); Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765 (1952); Tillman v. Byrd, 211 Ga. 918, 89 S.E.2d 479 (1955); Sheppard v. Broome, 214 Ga. 659, 107 S.E.2d 219 (1959); Brogdon v. Purvis, 220 Ga. 28, 136 S.E.2d 719 (1964); Hobbs v. Clark, 221 Ga. 558, 146 S.E.2d 271 (1965); Norman v. Van Gerpen, 221 Ga. 698, 146 S.E.2d 769 (1966); Fender v. Fender, 226 Ga. 129, 173 S.E.2d 211 (1970); Titshaw v. Carnes, 226 Ga. 430, 175 S.E.2d 541 (1970); Fender v. Fender, 228 Ga. 202, 184 S.E.2d 590 (1971); Mullinax v. Shaw, 143 Ga. App. 657, 239 S.E.2d 547 (1977); Guillebeau v. Yeargin, 254 Ga. 490, 330 S.E.2d 585 (1985); Kimbrell v. Connor, 218 Ga. App. 812, 463 S.E.2d 376 (1995).

Applicability of Section

Applicability of section. — Before it is applicable, this section requires great inadequacy of consideration joined with great disparity of mental ability. It follows, therefore, that both must exist. Bailey v. Williams, 215 Ga. 395, 110 S.E.2d 673 (1959).

Under the principle enunciated in this section, a deed may be set aside in equity, on proof of the two elements stated (in this section), without proof of anything else as to fraud. Sutton v. McMillan, 213 Ga. 90, 97 S.E.2d 139 (1957); Titshaw v. Carnes, 224 Ga. 57, 159 S.E.2d 420 (1968); Jackson v. Rich, 227 Ga. 149, 179 S.E.2d 256 (1971); Harrell v. Wilson, 233 Ga. 899, 213 S.E.2d 871 (1975).

Principle of this section is applica-

Applicability of Section (Cont'd)

ble whether the consideration be the payment of a sum of money or the rendition of services. Fuller v. Stone, 207 Ga. 355, 61 S.E.2d 467 (1950).

Failure to show disparity of mental ability in foreclosure sale contract. — Superior court did not err in granting a purchaser summary judgment in the purchaser's action seeking specific performance pursuant to O.C.G.A. § 23-2-131 requiring a mortgage company to deliver a deed conveying certain property because the company failed to demonstrate any merit in the company's contention that the superior court improperly refused to invoke the court's equitable power to relieve the company from performing under the foreclosure sale contract on the ground that the opening bid the company set forth was a mistake; although the company complained that the high bid was inadequate, the company failed to establish how that complaint allowed for the company to avoid the foreclosure sale contract, and the company did not cite any evidence authorizing a finding of any such disparity between the company and the purchaser. Decision One Mortg. Co., LLC v. Victor Warren Props., Inc., 304 Ga. App. 423, 696 S.E.2d 145 (2010).

Inadequate Consideration and Mental Disparity Generally

1. In General

Want of consideration for a conveyance, coupled with mental weakness or old age and undue influence, will authorize equitable relief. Harden v. Weaver, 184 Ga. 652, 192 S.E. 384 (1937).

"Great inadequacy of consideration, joined with great disparity of mental ability in contracting a bargain, may justify equity in setting aside a sale or other contract." Under that principle, a deed may be set aside in equity, on proof of the two elements stated, "without proof of anything else" as to fraud. A fortiori, the same rule would apply with at least equal force in case of such mental disparity and a total absence of consideration. Stow v. Hargrove, 203 Ga. 735, 48 S.E.2d 454 (1948).

Conflict as to issue of disparate mental ability. — When, in a wrongful death action, a railroad argued there was no evidence presented to show a disparate mental ability between anyone representing the railroad on the one hand and the plaintiffs on the other at the time of their signing of a contract of release, but plaintiffs showed that the plaintiffs were in a highly emotional state following the death of their son and that treatment for their stress included valium, and a psychologist, who tested the plaintiffs found their I.Q. levels to be in the "mentally defective" range, while the railroad agent involved, on the other hand, was college educated and had some 20 years' experience in claims investigation and settlement, under the "any evidence" standard, the railroad was not entitled to a directed verdict. Southern Ry. v. Lawson, 256 Ga. 798, 353 S.E.2d 491 (1987).

Mental disparity. — Generally, this section is applied in those instances where great mental disparity is relied upon by one of the parties to the contract. Moore v. Wells, 212 Ga. 446, 93 S.E.2d 731 (1956).

2. Fraud

Fraud in the procurement renders contract void. — As between the original parties thereto, fraud in its procurement voids a contract, and this upon the theory that, the consent of the parties being necessary to the binding force of a contract, if one, apparently consenting by the execution of a written contract, can show that one did not in fact consent to its terms as therein expressed, but that one's apparent consent was induced by false and fraudulent practices, by means of which one was overreached by the other party, and, without negligence upon one's own part, really deceived as to the terms of the contract, one would be entitled to be relieved from its apparent obligations. McKaig v. Hardy, 196 Ga. 582, 27 S.E.2d 11 (1943).

Jury instruction on fraud authorized. — When the grantor of an "improvident or profuse" deed was not wholly incapable of entering into such a contract, but was possessed of little or no will power and was greatly under the influence of the nephew to whom the deed was executed, an inference of fraud could have been

drawn by the jury, and, the evidence for the defendant grantee not being such as to rebut the inference as a matter of law, the court was authorized to charge the jury upon the subject of fraud. Stanley v. Stanley, 175 Ga. 139, 175 S.E. 496 (1934).

Fraud in realty transactions. — As against one who by fraud during the lifetime of deceased husband induced the latter to execute to that one a deed to realty, equity will afford the widow, as personal representative, a remedy to cancel and set aside the deed and incidentally to preserve and apply rents issuing from such realty. Ealy v. Tolbert, 209 Ga. 575, 74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

3. Insanity

When the maker is insane and the other party sane, there would be great mental disparity. The law, however, presumes one to be sane. Norwood v. Norwood, 207 Ga. 148, 60 S.E.2d 449 (1950).

4. Weakness of Mind

Weakness of mind not amounting to imbecility insufficient mental incapacity to justify setting deed aside. — The law recognizes that there is "some disparity of mental ability between all persons who deal with each other," and "weakness of mind not amounting to imbecility is not sufficient mental incapacity to justify setting a deed aside." Bailey v. Williams, 215 Ga. 395, 110 S.E.2d 673 (1959); Thomas v. Garrett, 265 Ga. 395, 456 S.E.2d 573 (1995).

5. Grief

Statement that person was "almost crazy with grief". — In action for cancellation or rescission of deed, the mere statement that the plaintiff was "almost crazy with grief over the recent death of her son" shows neither a mental incapacity to execute the instrument nor a "great disparity of mental ability" between the parties, such as would authorize the interference of equity on account of a "great inadequacy" of consideration, even if a "great inadequacy" had been sufficiently alleged. Hutchinson v. King, 192 Ga. 402, 15 S.E.2d 523 (1941).

Will executed within days of spouse's death. — Trial court did not err in charging the jury under O.C.G.A. § 23-2-2 in a suit by an 83-year old plaintiff to recover property from defendants, her brother-in-law and his wife, because the evidence showed that defendants took plaintiff to her bank and to a lawyer 10 days after her husband died, where she deeded her entire estate to them. Mullis v. Mullis, 245 Ga. App. 845, 539 S.E.2d 189 (2000).

6. Intoxication

When a party at the time of entering into a contract or executing an instrument is intoxicated to such a degree as to deprive the party of the party's reason and to disqualify the party's mind to apprehend the nature of the party's act and its probable consequences, a court of equity may grant relief by rescission and cancellation. Equity will grant relief when the transfer of a valuable property has been fraudulently extorted, for a grossly inadequate consideration, from a person while in such a state of intoxication as to render the party incapable of transacting business. McKaig v. Hardy, 196 Ga. 582, 27 S.E.2d 11 (1943); Ealy v. Tolbert, 209 Ga. 575, 74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

Equity will grant relief when the transfer of a valuable property has been fraudulently extorted, for a grossly inadequate consideration, from a person while in such a state of intoxication as to render the person incapable of transacting business. Ealy v. Tolbert, 209 Ga. 575, 74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

Valuation of Consideration

Questions of value are peculiarly for the determination of the jury when there is any data in evidence upon which the jury may legitimately exercise their "own knowledge or ideas." Brinson v. Hester, 185 Ga. 761, 196 S.E. 412 (1938).

Pleading and Practice

Evidence of confidential relationships raises presumption of undue

Pleading and Practice (Cont'd)

influence. — When evidence is presented of a confidential relationship, the grantor being of weaker mentality and the grantee occupying the dominant position, an issue of fact is raised as to undue influence. Fletcher v. Fletcher, 242 Ga. 158, 249 S.E.2d 530 (1978).

Charge to jury. — When the sole question was whether the transaction was an outright sale or a loan of money, and not a question of one party overreaching the other party the court did not err in not charging this section with respect to great inadequacy of consideration and great disparity of mental ability between the contracting parties. Batts v. Bedingfield, 204 Ga. 160, 48 S.E.2d 848 (1948).

In an action to set aside a deed, an instruction that the jury might set aside a deed if the jury found the mental ability of one party merely less than the mental ability of the person with whom he or she was being compared was erroneous and, further, the giving of the charge was error because there was no evidence to warrant it. Godwin v. Godwin, 265 Ga. 891, 463 S.E.2d 685 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Duress and Undue Influence, § 35 et seq. 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 23.

C.J.S. — 37 C.J.S., Fraud, §§ 1, 60, 67.

23-2-3. Payment of lost bonds or notes.

In cases of lost bonds or negotiable securities, the court may decree that payment shall be made, provided indemnity is given against liability or loss resulting from such payment.

History. — Orig. Code 1863, § 3046; Code 1868, § 3058; Code 1873, § 3113; Code 1882, § 3113; Civil Code 1895, § 3969; Civil Code 1910, § 4566; Code 1933, § 37-214.

Law reviews. — For note, the voluntary-payment doctrine in Georgia, see 16 Ga. L. Rev. 893 (1982).

ARTICLE 2

ACCIDENT AND MISTAKE

Cross references. — Pleading requirements in actions involving mistake, § 9-11-9. Effect of mistake on enforcement of contract, § 13-5-4.

23-2-20. Which accidents relievable in equity.

An accident relievable in equity is an occurrence, not the result of negligence or misconduct of the party seeking relief in relation to a contract, as was not anticipated by the parties when the contract was entered into, which gives an undue advantage to one of them over another in a court of law.

History. — Orig. Code 1863, § 3045; Code 1868, § 3057; Code 1873, § 3112; Code 1882, § 3112; Civil Code 1895, § 3968; Civil Code 1910, § 4565; Code 1933, § 37-201.

JUDICIAL DECISIONS

Accident in its strict sense implies the absence of negligence for which no one would be liable. Richter v. Atlantic Co., 65 Ga. App. 605, 16 S.E.2d 259 (1941).

In its proper use the term accident excludes negligence; that is, an accident is an event which occurs without the fault, carelessness, or want of proper circumspection of the person affected, or which could not have been avoided by the use of that kind and degree of care necessary to the exigency and in the circumstances in which one was placed. Richter v. Atlantic Co., 65 Ga. App. 605, 16 S.E.2d 259 (1941).

Voluntary dismissal of claims with prejudice was not a contract and, thus, O.C.G.A. §§ 23-2-20 and 23-2-21 did not apply to authorize setting aside the dismissal. Kent v. State Farm Mut. Auto. Ins. Co., 233 Ga. App. 564, 504 S.E.2d 710 (1998).

Cited in Williamson v. Floyd County Wildlife Ass'n, 215 Ga. 789, 113 S.E.2d 626 (1960); Tripp v. Conner, 220 Ga. 2, 136 S.E.2d 744 (1964); Finch v. McAloney, 222 Ga. 174, 149 S.E.2d 100 (1966); Gay v. AMOCO, 115 Ga. App. 18, 153 S.E.2d 612 (1967); Humble Oil & Ref. Co. v. Mitchell, 230 Ga. 323, 197 S.E.2d 126 (1973); Kidd v. Kidd, 237 Ga. 232, 227 S.E.2d 259 (1976); Rose v. Cain, 247 Ga. App. 481, 544 S.E.2d 453 (2001); Beasley v. Wachovia Bank, 277 Ga. App. 698, 627 S.E.2d 417 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 44.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Right to recover back in an action at law money paid upon an existing judgment, procured by or grounded on fraud or mistake, 9 A.L.R. 400.

Insurance: death or injury resulting from insured's voluntary act as caused by accident or accidental means, 42 A.L.R. 243; 45 A.L.R. 1528; 71 A.L.R. 1437; 111 A.L.R. 628.

Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental, strictly on time, 5 A.L.R.2d 993.

Rupture of blood vessel following exertion or exercise as within terms of accident provision of insurance policy, 35 A.L.R.2d 1105.

Power of equity court to reach or to sequester, for seizure and sale, beneficial equitable interests in corporate stock shares, 42 A.L.R.2d 920.

Repeated absorption of poisonous substance as "accident" within coverage clause of comprehensive general liability policy, 49 A.L.R.2d 1263.

Accident insurance: death or injury intentionally inflicted by another as due to accident or accidental means, 49 A.L.R.3d 673.

23-2-21. What mistakes relievable in equity; power to relieve to be exercised cautiously.

(a) A mistake relievable in equity is some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence.

(b) Mistakes may be either of law or of fact.

(c) The power to relieve mistakes shall be exercised with caution; to justify it, the evidence shall be clear, unequivocal, and decisive as to the mistake.

History. — Orig. Code 1863, §§ 3050, 3053; Code 1868, §§ 3062, 3065; Code 1873, §§ 3117, 3120; Code 1882, §§ 3117, 3120; Civil Code 1895, §§ 3973, 3977; Civil Code 1910, §§ 4570, 4574; Code 1933, §§ 37-202, 37-203.

Cross references. — Form of complaint for money paid by mistake, § 9-11-107.

Law reviews. — For note, the voluntary-payment doctrine in Georgia, see 16 Ga. L. Rev. 893 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
Mutual Mistake
Ignorance of Fact
Reasonable Diligence
Pleading and Practice

General Consideration

A mistake, either of law or fact, is cognizable in equity and affords a remedy therein by reformation of the instrument so as to make it express the true intention of the parties, on a proper cause being made; but such a jurisdiction will always be cautiously exercised, and to justify it the evidence must be clear, unequivocal, and decisive. Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E.2d 534 (1946); Prince v. Friedman, 202 Ga. 136, 42 S.E.2d 434 (1947).

Reformation as applied to a contract is remedy cognizable in equity for the purpose of correcting an instrument so as to make it express the true intention of the parties, when from some cause, such as fraud, accident, or mistake it does not express such intention. The remedy is not available for the purpose of making a new and different contract for the parties, but is confined to establishment of the actual agreement. Deck v. Shields, 195 Ga. 697, 25 S.E.2d 514 (1943).

Equity exercised with caution. — The power in equity to relieve mistakes should be exercised with caution, and the evidence shall be clear, unequivocal and decisive as to the mistake. Thomaston v. Fort Wayne Pools, Inc., 181 Ga. App. 541, 352 S.E.2d 794 (1987).

Mistake defined. — Mistake, within the meaning of equity, is an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction, but without its erroneous character being intended or known at the time. Callan Court Co. v. Citizens & S. Nat'l Bank, 184 Ga. 87, 190 S.E. 831 (1937); Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

Mistake is internal and essentially ignorance. — Mistake is internal; it is a mental condition, a conception, a conviction of the understanding; erroneous indeed, but nonetheless a conviction which influences the will and leads to some outward physical manifestation. Its operation is ordinarily, though not always, affirmative the doing of some act which would not have been done in the absence of the particular conception or conviction which influenced the free action of the will. Its essential requisite is ignorance. Callan Court Co. v. Citizens & S. Nat'l Bank, 184 Ga. 87, 190 S.E. 831 (1937).

The essential element of a mistake is a mental condition or conception or conviction of the understanding. This mental condition may be either a passive state or an active conviction. When merely passive, it may consist of an unconsciousness,

an ignorance, or a forgetfulness; when active, it must be a belief. In the first of these two conditions, the unconsciousness, ignorance, or forgetfulness may be either of a fact which is present and now existing, or of a fact which is past and has existed; they must always concern a fact material to the transaction. In the second condition, the belief may be either that a certain matter or thing exists at the present time which really does not exist; or that certain matter or thing existed at some time which did not really exist. All possible forms of mistake of fact are embraced within this description; and all particular errors which fall under any of these conditions are mistakes of fact which furnish an occasion for equitable relief. Callan Court Co. v. Citizens & S. Nat'l Bank, 184 Ga. 87, 190 S.E. 831 (1937).

Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in, an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed. Callan Court Co. v. Citizens & S. Nat'l Bank, 184 Ga. 87, 190 S.E. 831 (1937).

Mistake is distinguished from fraud, fraudulent representations, or fraudulent concealments, by the absence of knowledge and intention, which in legal fraud are actually present, and in constructive fraud are theoretically present, as necessary elements. It is also distinguished from that inattention or absence of thought which are inherent in negligence. The erroneous conception or conviction of the understanding which constitutes the equitable notion of mistake has nothing in common with negligence; equity will not relieve a person from the person's own erroneous acts or omissions resulting from the person's own negligence. Callan Court Co. v. Citizens & S. Nat'l Bank, 184 Ga. 87, 190 S.E. 831 (1937).

If equity can reform a contract for sale of land, it can also reform the deed to the land. West Lumber Co. v. Moore, 179 Ga. 302, 175 S.E. 642 (1935).

Question of fact as to whether reformation warranted. — Trial court erred in granting summary judgment to the borrowers on the bank's claim for equitable reformation of the security deeds because evidence included the fact that a portion of the 2003 loan paid off a joint debt previously secured by the property and the borrowers subsequently represented to the bankruptcy court that the debt secured by the property was jointly owed, which created a question of fact as to whether the debt was secured by the real property at issue. Bank of Am., N.A. v. Cuneo, 332 Ga. App. 73, 770 S.E.2d 48 (2015).

Reformation of lease agreement denied. — In an action seeking reformation of a lease agreement to include an option to purchase, the trial court properly granted the defendant's motion for directed verdict at the close of the plaintiff's evidence, when there was no evidence of mutual mistake, there was likewise no evidence of fraud or inequitable conduct in the record, it was undisputed that the plaintiff did not read the lease agreement until months after the plaintiff signed the lease, and the record did not demonstrate that a confidential relationship existed between the parties, but rather showed that they were friends engaged in an arms' length transaction. A.J. Concrete Pumping, Inc. v. Richard O'Brien Equip. Sales, Inc., 256 Ga. 795, 353 S.E.2d 496 (1987).

No mutual mistake because contract addressed disputed subject. — Parties to a business buyout agreement failed to show mutual mistake regarding the validity of a proposed lease assignment because the parties specifically contemplated that the original office building lease or assignment might have to be changed, that the assignment might never occur even with the best efforts of the parties, and that any risk in that regard would be assumed by the buying parties. Extremity Healthcare, Inc. v. Access to Care America, LLC, 339 Ga. App. 246, 793 S.E.2d 529 (2016).

Cited in Sapp v. Ritch, 169 Ga. 33, 149 S.E. 636 (1929); West Lumber Co. v. Moore, 179 Ga. 302, 175 S.E. 642 (1935);

General Consideration (Cont'd)

Bender v. Randall Bros., 189 Ga. 197, 5 S.E.2d 889 (1939); Gibbs v. H.T. Henning Co., 189 Ga. 675, 7 S.E.2d 238 (1940); Sawyer Coal & Ice Co. v. Kinnett-Odom Co., 192 Ga. 166, 14 S.E.2d 879 (1941); Deck v. Shields, 195 Ga. 697, 25 S.E.2d 514 (1943); Lane v. Howard, 201 Ga. 616, 40 S.E.2d 537 (1946); McCullough v. Kirby, 204 Ga. 738, 51 S.E.2d 812 (1949); Hood v. Connell, 204 Ga. 782, 51 S.E.2d 853 (1949); Minor v. Fincher, 206 Ga. 721, 58 S.E.2d 389 (1950); Scurry v. Cook, 206 Ga. 876, 59 S.E.2d 371 (1950); Altman v. Strouse, 210 Ga. 282, 79 S.E.2d 801 (1954); Miller v. Shaw, 212 Ga. 302, 92 S.E.2d 98 (1956); Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958); White County v. Wooten, 219 Ga. 236, 132 S.E.2d 653 (1963); Tripp v. Conner, 220 Ga. 2, 136 S.E.2d 744 (1964); Farmers Whse. of Pelham, Inc. v. Collins, 220 Ga. 141, 137 S.E.2d 619 (1964); Finch v. McAloney, 222 Ga. 174, 149 S.E.2d 100 (1966); Bonner v. Cotton, 223 Ga. 843, 159 S.E.2d 61 (1968); Hartford Accident & Indem. Co. v. Walka Mt. Camp No. 565, Woodmen of the World, Inc., 224 Ga. 194, 160 S.E.2d 833 (1968); William H. Benton Co. v. Irvindale Dairies, Inc., 224 Ga. 780, 164 S.E.2d 819 (1968); B.L. Ivey Constr. Co. v. Pilot Fire & Cas. Co., 295 F. Supp. 840 (N.D. Ga. 1968); Lewis v. Williford, 235 Ga. 558, 221 S.E.2d 14 (1975); Martin v. Heard, 239 Ga. 816, 238 S.E.2d 899 (1977); Roberts v. Gunter, 251 Ga. 276, 304 S.E.2d 369 (1983); Atkinson v. Atkinson, 254 Ga. 70, 326 S.E.2d 206 (1985); Fulghum v. Kelly, 255 Ga. 652, 340 S.E.2d 589 (1986); Mag Mut. Ins. Co. v. Gatewood, 186 Ga. App. 169, 367 S.E.2d 63 (1988); Rose v. Cain, 247 Ga. App. 481, 544 S.E.2d 453 (2001).

Mutual Mistake

Equity will not reform a contract on the ground of mistake, unless it be a mutual one or unless there be a mistake on one side and fraud on the other. Rawson v. Brosnan, 187 Ga. 624, 1 S.E.2d 423 (1939); Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E.2d 534 (1946).

Equity will not decree the reformation of an instrument because of mistake of one of the parties alone unmixed with any fraud or knowledge on the part of the other equivalent to mutual mistake. For a mistake to be relievable in equity by reformation, it must be mutual, or else mistake on the part of one to the contract and fraud on the part of the other. Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E.2d 534 (1946); Prince v. Friedman, 202 Ga. 136, 42 S.E.2d 434 (1947).

A court of equity will reform a contract of sale when, from mutual mistake or mistake common to both parties, an instrument does not express the true agreement of the parties. Equity will also reform an instrument when there is mistake on one side, and fraud or inequitable conduct on the other. Prince v. Friedman, 202 Ga. 136, 42 S.E.2d 434 (1947).

To enable a court to reform an agreement evidenced by writing on the ground of mistake, it must affirmatively appear that the mistake was common to both parties, and that the writing, as executed, expresses the contract as understood by both parties. Prince v. Friedman, 202 Ga. 136, 42 S.E.2d 434 (1947).

If a writing has been executed with a view of obtaining a particular object, and by mistake it has been so drawn as not to have the contemplated operations at law, chancery (now equity) will reform the instrument, so that it will fulfill the intention of the parties. Agreements, whether executed or executory, within or without the statute of frauds, whether for the conveyance of real or personal property, will be reformed by courts of equity, on the ground of mistake. Head v. Stephens, 215 Ga. 184, 109 S.E.2d 772 (1959), later appeal, 218 Ga. 191, 126 S.E.2d 623 (1962).

"An honest mistake of the law as to the effect of an instrument on the part of both contracting parties, when such mistake operates as a gross injustice to one, and gives an unconscientious advantage to the other, may be relieved in equity." Fidelity & Deposit Co. v. State Hwy. Dep't, 174 Ga. 443, 163 S.E. 174 (1932).

Simple mistake not ground for relief. — The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which one executes, or as to the legal result of an act which he

performs, is no ground for either defensive or affirmative relief. Callan Court Co. v. Citizens & S. Nat'l Bank, 184 Ga. 87, 190 S.E. 831 (1937).

When a defendant has been served and a judgment is rendered against the defendant by fraud, accident, or mistake, without fault or negligence on the defendant's part, a petition in equity to set aside the judgment will lie. Dollar v. Fred W. Amend Co., 184 Ga. 432, 191 S.E. 696 (1937).

When, due to a mistake of fact unmixed with negligence, the condemnation proceeding for a public road was conducted throughout upon the theory that the road would be paved at approximately grade level, thus improving rather than damaging the remaining abutting property, and there was nothing to indicate that a fill of from 25 to 40 feet would be made in front of the remaining property which would damage it in the amount of approximately $20,000.00, a petition in equity, alleging these facts and alleging that the mistake prevented the owners from proving this consequential damage, alleged a cause of action to set aside the award and the judgment of condemnation and to recover the full damages. Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

Because the plaintiff had opportunity to examine a second written tolling agreement before the plaintiff executed it, and because there was no suggestion that the alleged mistake in the agreement was anything other than a unilateral mistake on the part of the plaintiff, the plaintiff's own negligence resulted in there being no basis for reforming the parties' second written tolling agreement. Frame v. Hunter, Maclean, Exley & Dunn, P.C., 236 Ga. App. 226, 511 S.E.2d 585 (1999).

Mistake of draftsman acting by direction of only one party as unilateral mistake. — In some jurisdictions it is held that the mistake of a draftsman or scrivener, acting by direction of only one of the parties, is a unilateral mistake, and is one which will not warrant reformation. Such appears to be the rule in this state. Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E.2d 534 (1946).

Plea of the defendant to action on note given by the defendant to the former partner on dissolution of the partnership, alleging mutual mistake in calculating the earnings of the business, failed to allege a mistake as contemplated by law, and the court did not err in dismissing the plea and in directing the verdict for the plaintiff. Hargrove v. Bledsoe, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

Wrong property foreclosed upon. — Because a mutual mistake of law was not a valid reason to nullify the parties' choice of Delaware law in order to uphold a right of first refusal, the parties' settlement agreement was not subject to reformation due to an alleged mutual mistake. Thus, under Delaware law, the right was properly declared invalid under the rule against perpetuities. CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Group, Inc., 283 Ga. 426, 659 S.E.2d 359 (2008).

Trial court properly reformed security deed and declared that suing lender had first priority over certain tract of land since there was no doubt that parties intended for the tract to have been subject to the security deed alone; trial court also properly directed verdict in favor of suing lender as to its claim for rescission and cancellation of the deed it obtained when it mistakenly foreclosed on the wrong tract, as such relief was the proper remedy. DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 662 S.E.2d 141 (2008).

Issue of fact in loan documents as to parties' mutual mistake. — In a lender's suit for reformation of a security deed to reflect that a different parcel owned by the borrower was the collateral, rather than the parcel described in the deed, the trial court erred in granting summary judgment for the borrower because inconsistencies in the loan documents raised an issue of fact as to whether there was a mistake. JPMorgan Chase Bank v. Cronan, No. A20A0378, 2020 Ga. App. LEXIS 358 (June 18, 2020).

No specific mutual mistake alleged. — Plaintiff's claim for reformation of a settlement agreement failed since the claim did not allege fraud by the defendants and did not identify any specific mutual mistake. Rohrig Invs., LP v. Knuckle P'ship, LLLP (In re Rohrig Invs., LP), 584 B.R. 382 (Bankr. N.D. Ga. 2018).

Mutual Mistake (Cont'd)

Reformation of a bond was warranted based on mutual mistake. — Reformation of a bond was warranted based on mutual mistake since it was clear that a bank of which a bankruptcy debtor was the parent company was intended to be a named insured under the bond which named only the debtor as an insured; the bank was a named insured on a prior bond which the current bond was intended to replace, the bank was a named insured on the bond application, and the bank paid the bond premium. Lubin v. Cincinnati Ins. Co., No. 1:09-CV-2985-RWS, 2010 U.S. Dist. LEXIS 133794 (N.D. Ga. Dec. 17, 2010), aff'd, 677 F.3d 1039 (11th Cir. 2012).

Summary judgment improper if questions of fact remained regarding whether quitclaim deed was contrary to parties' agreement. — Trial court erred in granting a son's motion for summary judgment as to a parent's counterclaim seeking to eject the son from a home and to have a quitclaim deed rescinded or reformed because material questions of fact remained regarding whether the terms of the quitclaim deed were, by mutual mistake, contrary to the agreement of the parties; the parent's deposition testimony could reasonably be construed to signify that the parent expressed the parent's willingness to convey the property only if the parent retained a life estate and that the son accepted the conveyance subject to that condition. Hall v. Hall, 303 Ga. App. 434, 693 S.E.2d 624 (2010).

Ignorance of Fact

Ignorance of fact will not justify the recission of a contract. Prince v. Friedman, 202 Ga. 136, 42 S.E.2d 434 (1947).

Reasonable Diligence

Reasonable diligence of complainant required. — Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence. What is a reasonable time must necessarily depend upon the peculiar facts and environments of the particular case. Parker v. Fisher, 207 Ga. 3, 59 S.E.2d 715 (1950).

Equity will grant no relief to one who by the exercise of ordinary diligence, could have prevented the injury complained of. Prince v. Friedman, 202 Ga. 136, 42 S.E.2d 434 (1947); Barham v. United States, 715 F. Supp. 1091 (M.D. Ga. 1989).

Failure of insured to read policy insufficient as proof of lack of ordinary diligence. — A mere failure of an insured to read the insured's policy of insurance does not amount to such laches as will debar the insured from having such policy reformed for mistake therein. A policy of insurance is issued by the insurer and signed by the insurer or the insurer's agent. It is not contemplated that the insured shall sign it. In the insurer's promise to deliver an accurate policy, according to the insurer's oral agreement with the insured, the insured has a just expectation that there will be no designed variance. Georgia Farm Bureau Mut. Ins. Co. v. Wall, 242 Ga. 176, 249 S.E.2d 588 (1978).

Pleading and Practice

Grounds of mistake must be fully alleged. — When a defendant, in a court of law, seeks to avoid the defendant's contract on the ground of mistake, the defendant must, by the defendant's pleadings, allege the grounds of the mistake, as fully as the defendant is required to do in a court of equity to entitle the defendant to relief. Hargrove v. Bledsoe, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

Rules of pleading in this state require that allegations of mistake should be set forth with considerable definiteness and certainty, and that such general allegations as that certain matters were left out of or included in the contract as written "by mutual mistake of the parties" are not sufficient. Wheeler v. Poole, 204 Ga. 477, 50 S.E.2d 326 (1948).

Evidence of mistake must be clear, unequivocal and decisive. — To authorize a verdict reforming a deed upon the ground of mutual mistake, the evidence, like the petition, should at least by inference show the particular mistake and illustrate how the mistake occurred; and

the evidence must be clear, unequivocal, and decisive as to the mistake. Helton v. Shellnut, 186 Ga. 185, 197 S.E. 287 (1938).

Jury charge on evidential standard. — Where the court did charge in language identical to that of this section, it is not subject to the criticism that it erred in its charge to the jury that they must decide the question of mistake by a preponderance of the testimony, whereas the law provides that the evidence must be clear, unequivocal, and decisive as to the mistake. Fidelity & Deposit Co. v. State Hwy. Dep't, 174 Ga. 443, 163 S.E. 174 (1932).

Preponderance of evidence is not correct standard. — It was error for the court to instruct the jury that the party seeking reformation of the description in a deed could establish the party's right thereto by a preponderance of the evidence only. Carroll v. Craig, 214 Ga. 257, 104 S.E.2d 215 (1958).

Evidence has to be clear, unequivocal and decisive. — In a diversity based suit in equity to set aside or deny res judicata effect to a prior state court judgment on the grounds of fraud and mutual mistake, the plaintiffs had to prove their claims by something more than a mere preponderance of the evidence. The evidence had to preponderate in the plaintiffs' favor, but it also had to be of "clear, unequivocal, and decisive" quality. Ahrens v. Katz, 595 F. Supp. 1108 (N.D. Ga. 1984).

Insufficient evidence of legal mistake. — In an action seeking cancellation of a warranty deed to a trustee, the beneficiary's testimony that the beneficiary could not remember the execution of the deed did not demand a finding that the deed should be cancelled on the ground of legal mistake. Ivey v. Ivey, 266 Ga. 143, 465 S.E.2d 434 (1996).

Evidence failed to show mistake of present or past fact. — Court would not construe an agreement and a deed together as creating a fee simple subject to a condition subsequent because a month-long gap between the execution of the agreement and the deed was too great of a gap in time to deem the documents as being executed contemporaneously. Nor would the court reform the documents to do so as the creditor failed to demonstrate a mistake of present or past fact relievable in equity, either by rescission or reformation. Kelley v. McCormack (In re Mitchell), 548 B.R. 862 (Bankr. M.D. Ga. 2016).

Parol evidence. — Before decreeing reformation, a court requires that the parol evidence of a mistake and of an alleged modification of a contract must be most clear and convincing. Georgia Farm Bureau Mut. Ins. Co. v. Wall, 242 Ga. 176, 249 S.E.2d 588 (1978).

In a suit for reformation of contract based upon alleged mutual mistake, the parol evidence rule does not bar introduction of testimony as to the oral agreement reached by the parties which the writing was intended to reflect. Georgia Farm Bureau Mut. Ins. Co. v. Wall, 242 Ga. 176, 249 S.E.2d 588 (1978).

Parol evidence can be offered to prove mistake. Vann v. Williams, 165 Ga. App. 457, 299 S.E.2d 908 (1983).

Creation of true writing to prevent unconscionable advantage. — When petition alleges that parties to a deed orally agreed that the consideration was to be $850.00 cash for the plaintiff's equity and that the defendants were to assume and pay certain loans on the property, and that, due to a mutual mistake of law as to the effect of a recital of a nominal consideration in a deed, the deed fails to state the true consideration agreed upon by the parties, the fact that the agreement is not in writing will not bar a recovery, since what is sought to be enforced is not an oral agreement barred by the statute of frauds, but to reduce to writing the true agreement between the parties to prevent an unconscionable advantage to one of the parties to a contract. Head v. Stephens, 215 Ga. 184, 109 S.E.2d 772 (1959), later appeal, 218 Ga. 191, 126 S.E.2d 623 (1962).

A docketing error made in the clerk's office amounts to an accident or mistake relievable in equity so far as the defendant is concerned, provided the failure to answer is attributable thereto, without fault or negligence on its part. Dollar v. Fred W. Amend Co., 184 Ga. 432, 191 S.E. 696 (1937).

A mere mistake in judgment or opinion as to the value of property

Pleading and Practice (Cont'd)

does not authorize interference by the courts. Hargrove v. Bledsoe, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 29, 30.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Relief from contract of sale because of mistake as to amount of commodity which it calls for, 31 A.L.R. 384.

Recovery back of public money paid by mistake, 63 A.L.R. 1346.

Misrepresentation or mistake as to whether corporate stock is assessable as one of law or of fact, 65 A.L.R. 1256.

Mistake as to law of another state or country as one of law or of fact, 73 A.L.R. 1260.

Good faith in receiving payment made under mistake of fact as affecting its recovery, 87 A.L.R. 649.

Conscious ignorance of fact, as distinguished from mistake of fact, as ground for reformation of contract, 137 A.L.R. 908.

Mistake by one party to contract as to identity of other party who acted in good faith, 147 A.L.R. 1171.

Right to refund or recovery back of taxes paid on property not owned by taxpayer, 165 A.L.R. 879.

Reformation of property insurance policy to correctly identify the person or interest insured, 25 A.L.R.2d 580.

What constitutes change of position by payee so as to preclude recovery of payment made under mistake, 40 A.L.R.2d 997.

Compensation for improvements made or placed on premises of another by mistake, 57 A.L.R.2d 263.

Right of tenant to recover rentals previously paid to one mistakenly believed to be owner of property, 57 A.L.R.2d 350.

Recovery back by employer of compensation paid to employee as result of mistake or the employee's fraud, 88 A.L.R.2d 1437.

What constitutes mistake in the identity of one of the parties to warrant annulment of marriage, 50 A.L.R.3d 1295.

23-2-22. Mistake of law in instrument by contracting parties.

An honest mistake of the law as to the effect of an instrument on the part of both contracting parties, when the mistake operates as a gross injustice to one and gives an unconscionable advantage to the other, may be relieved in equity.

History. — Orig. Code 1863, § 3055; Code 1868, § 3067; Code 1873, § 3122; Code 1882, § 3122; Civil Code 1895, § 3979; Civil Code 1910, § 4576; Code 1933, § 37-204.

Law reviews. — For annual survey of recent developments, see 38 Mercer L. Rev. 473 (1986).

JUDICIAL DECISIONS

Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence. What is a reasonable time must necessarily depend upon the peculiar facts and environments of the particular case. Parker v. Fisher, 207 Ga. 3, 59 S.E.2d 715 (1950).

O.C.G.A. § 23-2-22 was inapplicable to a company's counterclaim to recover payments under a purchase agreement as O.C.G.A. § 23-2-22 offered relief following a mistake of law; the company made the payments in ignorance of the law and O.C.G.A. § 13-1-13 prohibited recovery of the payments voluntarily made in igno-

rance of the law. Wallis v. B & A Construction Co., 273 Ga. App. 68, 614 S.E.2d 193 (2005).

Contract not reformed based on mutual mistake of law. — Because a mutual mistake of law was not a valid reason to nullify the parties' choice of Delaware law in order to uphold a right of first refusal, the parties' settlement agreement was not subject to reformation due to an alleged mutual mistake. Thus, under Delaware law, the right was properly declared invalid under the rule against perpetuities. CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Group, Inc., 283 Ga. 426, 659 S.E.2d 359 (2008).

Parol evidence can be offered to prove mistake. Vann v. Williams, 165 Ga. App. 457, 299 S.E.2d 908 (1983).

Admissibility of parol evidence. — See Posey v. Medical Center-West, Inc., 257 Ga. 55, 354 S.E.2d 417 (1987) (release of tortfeasor from liability).

Standing to seek reformation of liability contract. — In certifying certain questions to the Georgia Supreme Court, the federal Court of Appeals concluded that it is an open question of Georgia law whether a person injured by a municipality has a beneficial interest in the municipality's liability contract sufficient to provide standing to seek reformation. Florida Int'l Indem. Co. v. City of Metter, 952 F.2d 1297 (11th Cir. 1992), aff'd, 984 F.2d 1138 (11th Cir. 1993).

In tort action, reformation warranted if mutual mistake. — After an insured signed a general release believing that the release would not affect the insured's claim against the insured's underinsured motorist carrier, reformation of the release would be warranted if mutual mistake of law could be proved. Superior Ins. Co. v. Dawkins, 229 Ga. App. 45, 494 S.E.2d 208 (1997).

Reformation claim barred by res judicata. — Despite a payee's argument that a reformation claim could not have previously been filed because neither party foresaw that a contract claim could have been disposed of as it was, that argument was rejected as spurious, and because this argument ignored the fact that the payee filed a prior quantum meruit claim, which was predicated on the lack of an enforceable contract; hence, the payor obviously anticipated that the contract might not be entirely enforceable, and having done so, could have recognized the need to bring a reformation claim in the earlier action. ChoicePoint Servs. v. Hiers, 284 Ga. App. 640, 644 S.E.2d 456 (2007), cert. denied, No. S07C1166, 2007 Ga. LEXIS 499 (Ga. 2007).

Cited in State Highway Dep't v. Fidelity & Deposit Co., 168 Ga. 288, 147 S.E. 522 (1929); Sapp v. Ritch, 169 Ga. 33, 149 S.E. 636 (1929); Gibbs v. H.T. Henning Co., 189 Ga. 675, 7 S.E.2d 238 (1940); Hutchinson v. King, 192 Ga. 402, 15 S.E.2d 523 (1941); Miller v. Shaw, 212 Ga. 302, 92 S.E.2d 98 (1956); Stein Steel & Supply Co. v. K. & L. Enters., Inc., 97 Ga. App. 71, 102 S.E.2d 99 (1958); Seaboard Constr. Co. v. Clifton, 121 Ga. App. 247, 173 S.E.2d 436 (1970); Atkinson v. Atkinson, 254 Ga. 70, 326 S.E.2d 206 (1985); Fulghum v. Kelly, 255 Ga. 652, 340 S.E.2d 589 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 36 et seq., 40 et seq.

ALR. — Mistake in lease as ground for relief, 26 A.L.R. 472.

Right to reformation of conveyance as depending upon consideration, 69 A.L.R. 423; 128 A.L.R. 1299.

Mistake as to law of another state or country as one of law or of fact, 73 A.L.R. 1260.

Avoidance on ground of fraud, mistake, duress, or mental incompetency of otherwise validly effected change of beneficiaries of insurance policies, 105 A.L.R. 950.

Misrepresentation as to matters of foreign law as actionable, 24 A.L.R.2d 1039.

Negligence in executing contract as affecting right to have it reformed, 81 A.L.R.2d 7.

23-2-23. Mistake of law in instrument by agent.

A mistake of law by the draftsman or other agent, by which the contract, as executed, does not fulfill or violates the manifest intention of the parties to the agreement, may be relieved in equity.

History. — Orig. Code 1863, § 3056; Code 1868, § 3068; Code 1873, § 3123; Code 1882, § 3123; Civil Code 1895, § 3980; Civil Code 1910, § 4577; Code 1933, § 37-205.

JUDICIAL DECISIONS

Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence. What is a reasonable time must necessarily depend upon the peculiar facts and environments of the particular case. Parker v. Fisher, 207 Ga. 3, 59 S.E.2d 715 (1950).

Standing to seek reformation of liability contract. — In certifying certain questions to the Georgia Supreme Court, the federal Court of Appeals concluded that it is an open question of Georgia law whether a person injured by a municipality has a beneficial interest in the municipality's liability contract sufficient to provide standing to seek reformation. Florida Int'l Indem. Co. v. City of Metter, 952 F.2d 1297 (11th Cir. 1992), aff'd, 984 F.2d 1138 (11th Cir. 1993).

Allegations of inadequate description by draftsman states case for reformation. — When a petition is brought by assignee for reformation of a written lease and option agreement, alleging a valuable consideration, and that permanent improvements had been made on the property involved, and that an alleged inadequate description of the property had been made by mistake of the draftsman, it having been the intention of the parties that the description contended for be inserted in the agreement, and further alleging that unless so reformed an unconscionable advantage would be acquired by the defendant, such allegations state a case for reformation of the lease and option agreement. Martin v. Oakhurst Dev. Corp., 197 Ga. 288, 29 S.E.2d 179 (1944).

A petition for reformation of a written contract will lie when by mistake of the scrivener and by oversight of the parties, the writing does not embody or fully express the real contract of the parties. McLoon v. McLoon, 220 Ga. 18, 136 S.E.2d 740 (1964).

Cited in Bender v. Randall Bros., 189 Ga. 197, 5 S.E.2d 889 (1939); Gibbs v. H.T. Henning Co., 189 Ga. 675, 7 S.E.2d 238 (1940); Redmond v. Sinclair Ref. Co., 204 Ga. 699, 51 S.E.2d 409 (1949); Sheldon v. Hargrose, 213 Ga. 672, 100 S.E.2d 898 (1957); Flagg v. Hedrick, 215 Ga. 16, 108 S.E.2d 703 (1959); Robinson v. Wright, 217 Ga. 199, 121 S.E.2d 640 (1961); Seaboard Constr. Co. v. Clifton, 121 Ga. App. 247, 173 S.E.2d 436 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 35, 36.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Relief in equity from mistake of law, 75 A.L.R. 896.

23-2-24. When mistake of fact relieved.

In all cases of a mistake of fact material to the contract or other matter affected by it, if the complaining party applies within a reasonable time, equity will grant relief.

History. — Orig. Code 1863, § 3058; Code 1868, § 3070; Code 1873, § 3125; Code 1882, § 3125; Civil Code 1895, § 3983; Civil Code 1910, § 4580; Code 1933, § 37-206.

JUDICIAL DECISIONS

Relief of mistake of fact generally. — Although equity will not reform a written contract because of mistake as to the contents of the writing on the part of the complaining party, who is able to read but fails to do so, when no sufficient excuse appears as to why such party did not read the contract, such principle has not been extended to cases in which it is sought to reform written instruments on the ground of mutual mistake of fact. Sheldon v. Hargrose, 213 Ga. 672, 100 S.E.2d 898 (1957).

Even when money is paid under a mistake of fact or in ignorance of facts, it cannot be recovered, unless the circumstances are such that the party receiving it ought not, in equity and good conscience, to be allowed to retain it. The expression, "in equity and good conscience," refers only to the acts and intentions of the person receiving the money as affecting the other party to the transaction. If one has acted in good faith and in good conscience with the person paying the money, one is entitled to retain it, even if one's actions and intentions may not have been in good faith and in good conscience as regards other persons not connected with the transaction. Bryant v. Guaranty Life Ins. Co., 40 Ga. App. 573, 150 S.E. 596 (1929).

When, due to a mistake of fact unmixed with negligence, the condemnation proceeding for a public road was conducted throughout upon the theory that the road would be paved at approximately grade level, thus improving rather than damaging the remaining abutting property, and there was nothing to indicate that a fill of from 25 to 40 feet would be made in front of the remaining property which would damage it in the amount of approximately $20,000.00, a petition in equity, alleging these facts and alleging that the mistake prevented the owners from proving this consequential damage, alleged a cause of action to set aside the award and the judgment of condemnation and to recover the full damages. Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958).

When a deed fixes the northern boundary of a tract of land as a certain public road, the legal effect of such description, in the absence of a contrary intention being manifested in the instrument, is that the road open and actually in use by the public is the road intended by the parties, rather than the site of an old road, and the language, being unambiguous, cannot be aided by extrinsic evidence to extend the boundary to the old-road site, the sole remedy for such purpose being reformation of the deed. Miller v. Rackley, 199 Ga. 370, 34 S.E.2d 438 (1945).

A defense of mistake of fact is not available to one who relies on a unilateral mistake, especially when the mistake, if there is one, is caused by the party's own negligence. Hyman v. Horwitz, 148 Ga. App. 647, 252 S.E.2d 74 (1979).

Evidence of mistake must be clear, unequivocal, and decisive. — A mistake, either of law or fact, is cognizable in equity and affords a remedy therein by reformation of the instrument so as to make the instrument express the true intention of the parties, on a proper cause being made; but such a jurisdiction will always be cautiously exercised, and to justify reformation the evidence must be clear, unequivocal, and decisive. Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E.2d 534 (1946).

Use of extrinsic evidence. — If the description in a deed is unambiguous, extrinsic evidence cannot be resorted to, except for the purpose of reforming the deed so as to make it express the real intention of the parties and correct a mutual mistake of fact. Miller v. Rackley, 199 Ga. 370, 34 S.E.2d 438 (1945).

Standing to seek reformation of liability contract. — In certifying certain questions to the Georgia Supreme Court, the federal Court of Appeals concluded

that it is an open question of Georgia law whether a person injured by a municipality has a beneficial interest in the municipality's liability contract sufficient to provide standing to seek reformation. Florida Int'l Indem. Co. v. City of Metter, 952 F.2d 1297 (11th Cir. 1992), aff'd, 984 F.2d 1138 (11th Cir. 1993).

Affirmation of contract barred rescission. — The plaintiffs were not entitled to rescission of their purchase of a house on the basis of a mistake of fact arising from a water line easement since their conduct in rebuilding the house with improvements following a tornado showed that they intended to treat the home as their own and was indicative of their affirmation of the contract. Aliabadi v. McCar Dev. Corp., 249 Ga. App. 309, 547 S.E.2d 607 (2001).

Highway contractor bringing suit under guise of mistake of fact. — A contractor who has bid for the excavation of highway sites on a basis of "unclassified material" may not, under the guise of mistake of fact, seek additional compensation in an action at law because the material excavated contained a higher percentage of rock than it expected, even though its only information at the time of the bid was results of test borings made available to it by the highway department (now Department of Transportation), since it was specifically stipulated that the data were not guaranteed and did not bind the department; when the department furnished all information which it had available, made no attempt to conceal actual conditions, and stipulated the provisional character of its tests, when the contractor had equal opportunity with the department to conduct its own investigation, and when the parties with knowledge of these facts elected to contract on a basis of material moved rather than to contract on a basis of the percentage of dirt and rock after removal. State Hwy. Dep't v. MacDougald Constr. Co., 102 Ga. App. 254, 115 S.E.2d 863 (1960).

Cited in Paris v. Treadaway, 173 Ga. 639, 160 S.E. 797 (1931); Young v. Hirsch, 187 Ga. 1, 199 S.E. 179 (1938); Bender v. Randall Bros., 189 Ga. 197, 5 S.E.2d 889 (1939); Orient Ins. Co. v. Dunlap, 193 Ga. 241, 17 S.E.2d 703 (1941); City of Jefferson v. Trustees of Martin Inst., 199 Ga. 71, 33 S.E.2d 354 (1945); Hargrove v. Bledsoe, 78 Ga. App. 107, 50 S.E.2d 223 (1948); Peerless Cas. Co. v. Housing Auth., 228 F.2d 376 (5th Cir. 1955); Robinson v. Wright, 217 Ga. 199, 121 S.E.2d 640 (1961); Eastside Carpet Mills, Inc. v. Dodd, 144 Ga. App. 580, 241 S.E.2d 466 (1978); Crane v. Adams-Cates Co., 256 Ga. 407, 350 S.E.2d 767 (1986); Rose v. Cain, 247 Ga. App. 481, 544 S.E.2d 453 (2001).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 31, 32.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Ignorance of, or mistake as to, terms of existing mortgage upon the property as ground for relief from a contract for the purchase of real property, 26 A.L.R. 528.

Relief from contract of sale because of mistake as to amount of commodity which it calls for, 31 A.L.R. 384.

Good faith in receiving payment made under mistake of fact as affecting its recovery, 87 A.L.R. 649.

Property rights in respect of building, fence, or other structure placed upon another's land through mistake as to boundary or location, 130 A.L.R. 1034.

Conscious ignorance of fact, as distinguished from mistake of fact, as ground for reformation of contract, 137 A.L.R. 908.

Reformation on ground of mutual mistake regarding character or extent of estate or title imported by language used in instrument, 141 A.L.R. 826.

Mistake as to existence, practicability of removal, or amount of minerals as ground for relief from mineral lease, 163 A.L.R. 878.

Measure and items of recovery for improvements mistakenly placed or made on land of another, 24 A.L.R.2d 11.

Recovery back by employer of compensation paid to employee as result of mistake or the employee's fraud, 88 A.L.R.2d 1437.

Reformation of property insurance pol-

icy to correctly identify the person or interest insured, 25 A.L.R.3d 580.

Vendor and purchaser: mutual mistake as to physical condition of realty as ground for rescission, 50 A.L.R.3d 1188.

What constitutes mistake in the identity of one of the parties to warrant annulment of marriage, 50 A.L.R.3d 1295.

When statute of limitations begins to run against action to recover money paid by mistake, 79 A.L.R.3d 754.

Right of insurer under health or hospitalization policy to restitution of payments made under mistake, 79 A.L.R.3d 1113.

23-2-25. Form of conveyance contrary to intent.

If the form of conveyance is, by accident or mistake, contrary to the intention of the parties in their contract, equity shall interfere to make it conform thereto.

History. — Orig. Code 1863, § 3047; Code 1868, § 3059; Code 1873, § 3114; Code 1882, § 3114; Civil Code 1895, § 3970; Civil Code 1910, § 4567; Code 1933, § 37-215.

Law reviews. — For comment advocating principle that grantee may obtain reformation of deed of gift over opposition of heirs of grantor, see 25 Ga. B.J. 445 (1963).

JUDICIAL DECISIONS

Reformation as applied to a contract is a remedy cognizable in equity for the purpose of correcting an instrument so as to make it express the true intention of the parties, when from some cause, such as fraud, accident, or mistake it does not express such intention. The remedy is not available for the purpose of making a new and different contract for the parties, but is confined to establishment of the actual agreement. Deck v. Shields, 195 Ga. 697, 25 S.E.2d 514 (1943).

An IRS objection to the proposed reformation of certain deeds to reflect that all parties to the transfer of a Georgia nursing home had intended an omitted tract to be included within the description was rejected despite the IRS's insistence that a lien filed pursuant to 26 U.S.C. § 6321 was effective to encumber the omitted tract because all criteria for reformation pursuant to O.C.G.A. § 23-2-25 were met. Nat'l Assistance Bureau, Inc. v. Macon Mem'l Intermediate Care Home, Inc., No. 5:06-cv-301 (CAR), 2009 U.S. Dist. LEXIS 66362 (M.D. Ga. June 8, 2009).

When the form of the conveyance or instrument is, by mutual mistake, contrary to the intention of the parties equity will interfere to make it conform thereto. In such cases, it is wholly immaterial from what cause the defective execution of the intent of the parties originated. Hill v. Agnew, 199 Ga. 644, 34 S.E.2d 702 (1945); Sheldon v. Hargrose, 213 Ga. 672, 100 S.E.2d 898 (1957).

Reformation to correct mutual mistake. — When personal property is sold, and a bill of sale with warranty of title is executed by the vendor, and the property is again sold with warranty of title, the last vendee and the vendee's vendor may join in an equitable petition against the original vendor, having for its purpose the reformation of the original bill of sale by including certain items of property omitted therefrom by mutual mistake. Chapman v. Cassels Co., 180 Ga. 349, 179 S.E. 91 (1935).

No cause of action for reformation. — When the plaintiffs sued as remaindermen to recover undivided interests in land after death of the life tenant, relying on a deed which by its terms plainly vested in them the remainder interest claimed, and the defendant contended that the deed had been so reformed by an equitable decree for reformation of the deed, rendered 50 years earlier, as to vest the fee-simple title in the person originally named as life tenant, from

whom he purchased, the so-called decree of reformation was void, for the reason that it was based upon a petition that did not state a cause of action for reformation, and did not contain enough to amend by as related to such relief, therefore the evidence demanded a verdict for the plaintiffs. Deck v. Shields, 195 Ga. 697, 25 S.E.2d 514 (1943).

Reformation of lease and option agreement. — When a petition is brought by assignee for reformation of a written lease and option agreement, alleging a valuable consideration, and that permanent improvements had been made on the property involved, and that an alleged inadequate description of the property had been made by mistake of the scrivener, it having been the intention of the parties that the description contended for be inserted in the agreement, and further alleging that unless so reformed an unconscionable advantage would be acquired by the defendant, such allegations state a case for reformation of the lease and option agreement. Martin v. Oakhurst Dev. Corp., 197 Ga. 288, 29 S.E.2d 179 (1944).

Reformation to correct description of land. — In action for specific performance of option agreement to convey land, plaintiff may have description of land reformed so as to fulfill parties' intention. Martin v. Oakhurst Dev. Corp., 197 Ga. 288, 29 S.E.2d 179 (1944).

Wrong property foreclosed upon. — Trial court properly reformed security deed and declared that suing lender had first priority over certain tract of land since there was no doubt that parties intended for the tract to have been subject to the security deed alone; trial court also properly directed verdict in favor of suing lender as to its claim for rescission and cancellation of the deed it obtained when it mistakenly foreclosed on the wrong tract, as such relief was the proper remedy. DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 662 S.E.2d 141 (2008).

Judgment creditor had no right to intervene in action for reformation of a deed. — Trial court abused the court's discretion in allowing a borrower's judgment creditor to intervene as a matter of right pursuant to O.C.G.A. § 9-11-24 in the borrower's action against the lender for reformation of a deed pursuant to O.C.G.A. § 23-2-25. The creditor had no interest directly relating to the subject matter of the suit and had other remedies. Potter's Props., LLC v. VNS Corp., 306 Ga. App. 621, 703 S.E.2d 79 (2010).

Question of fact as to whether reformation warranted. — Trial court erred in granting summary judgment to the borrowers on the bank's claim for equitable reformation of the security deeds because evidence included the fact that a portion of the 2003 loan paid off a joint debt previously secured by the property and the borrowers subsequently represented to the bankruptcy court that the debt secured by the property was jointly owed, which created a question of fact as to whether the debt was secured by the real property at issue. Bank of Am., N.A. v. Cuneo, 332 Ga. App. 73, 770 S.E.2d 48 (2015).

In a lender's suit for reformation of a security deed to reflect that a different parcel owned by the borrower was the collateral, rather than the parcel described in the deed, the trial court erred in granting summary judgment for the borrower because inconsistencies in the loan documents raised an issue of fact as to whether there was a mistake. JPMorgan Chase Bank v. Cronan, No. A20A0378, 2020 Ga. App. LEXIS 358 (June 18, 2020).

Reformation not warranted. — Creditor could not prevail on the creditor's claim for equitable reformation of a security deed executed by a debtor that did not own the property because nothing in the chain of title provided constructive notice to a potential purchaser of the property of the creditor's equitable interest in the property. Stearns Bank, N.A. v. Rent-A-Tent, Inc. (In re Rent A Tent, Inc.), 468 B.R. 442 (Bankr. N.D. Ga. 2012).

Court would not construe an agreement and a deed together as creating a fee simple subject to a condition subsequent because a month-long gap between the execution of the agreement and the deed was too great of a gap in time to deem the documents as being executed contemporaneously. Nor would the court reform the documents to do so as the creditor failed to

demonstrate a mistake of present or past fact relievable in equity, either by rescission or reformation. Kelley v. McCormack (In re Mitchell), 548 B.R. 862 (Bankr. M.D. Ga. 2016).

Taking as true for purposes of a Chapter 7 trustee's motion for judgment on the pleadings a bank's contention that the parties involved in the sale, financing, and purchase of the property at issue intended that the property be conveyed to the debtor wife alone and intended that the security deed encumber the entire property rather than only an undivided one-half interest, the bank was not entitled to reformation of a special warranty deed (SWD) under Georgia law because as a security deed grantee, it was not an original party to the SWD or in privity with any party to the SWD. Bank of Am., N.A. v. Adams (In re Adams), 583 B.R. 541 (Bankr. N.D. Ga. 2018).

Reformation warranted. — Creditor prevailed on the creditor's claim for equitable reformation of a security deed executed by a debtor that did not own the property because a later modification of the deed was filed and was within the chain of title for the property, providing any potential purchaser of the property constructive notice of the creditor's equitable interest in the property. Stearns Bank, N.A. v. Rent-A-Tent, Inc. (In re Rent A Tent, Inc.), 468 B.R. 442 (Bankr. N.D. Ga. 2012).

Reformation was appropriate under Georgia law as it was clear that both a Chapter 13 debtor and a bank intended the legal description in a security deed to include tract two only, and that a mutual mistake occurred due to a scrivener's error. There was no prejudice to the debtor as the trustee required the debtor to propose a Chapter 13 plan as though the deed had been reformed; further, prejudice due to the loss of debtor's house was not grounds to deny reformation as the debtor contracted and intended to pledge tract two as collateral, the debtor had the use of the loan proceeds, and the debtor used funds to satisfy an earlier debt on the tract. Deutsche Bank Nat'l Trust Co. v. Thompson (In re Thompson), 499 B.R. 908 (Bankr. S.D. Ga. 2013).

Trial court did not err in granting summary judgment to the bank as to the bank's claim for reformation to include a mistakenly omitted signature on the security deed as the borrowers had not suffered prejudice when the borrowers received a loan and used part of that loan to satisfy an earlier loan from another lender relating to the property, and the borrowers failed to show that the borrowers would suffer any prejudice if the deed were reformed. Vibert v. Bank of America, N.A., 327 Ga. App. 782, 761 S.E.2d 162 (2014).

Bankruptcy court did not commit clear error in reforming a security deed and cancelling a quitclaim deed due to the parties' mutual mistake because the undisputed facts showed that the Chapter 13 debtor and the lender intended for the security deed's legal description to include one tract and not three tracts. Thompson v. Deutsche Bank Nat'l Trust Co. (In re Thompson), No. 113-181, 2014 U.S. Dist. LEXIS 110609 (S.D. Ga. Aug. 11, 2014).

Lenders were entitled to equitable reformation as the evidence demonstrated that the parties had earlier attempted to modify the security deed to include both parcels in the legal description attached to the security deed and to establish both parcels as security for the subject loan. Black v. Nationstar Mortgage, LLC, 344 Ga. App. 217, 809 S.E.2d 487 (2018).

Cited in Cheatham v. Palmer, 178 Ga. 223, 172 S.E. 462 (1934); McCollum v. Loveless, 187 Ga. 262, 200 S.E. 115 (1938); Bender v. Randall Bros., 189 Ga. 197, 5 S.E.2d 889 (1939); Gibbs v. H.T. Henning Co., 189 Ga. 675, 7 S.E.2d 238 (1940); Redmond v. Sinclair Ref. Co., 204 Ga. 699, 51 S.E.2d 409 (1949); Srochi v. Postell, 206 Ga. 59, 55 S.E.2d 603 (1949); Flagg v. Hedrick, 215 Ga. 16, 108 S.E.2d 703 (1959); Polk v. Sherod, 240 Ga. 680, 242 S.E.2d 157 (1978); Curry v. Curry, 267 Ga. 66, 473 S.E.2d 760 (1996); Vance v. Jackson, 233 Ga. App. 480, 504 S.E.2d 529 (1998).

RESEARCH REFERENCES

ALR. — Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 33 A.L.R. 51.

Power of equity in absence of statute to render deficiency judgment in foreclosure action, 34 A.L.R. 1015.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 44 A.L.R. 78; 79 A.L.R.2d 1180.

Right to reformation of conveyance as depending upon consideration, 69 A.L.R. 423; 128 A.L.R. 1299.

Right of present claimant of title as against original or intermediate grantor to reformation to correct error in description common to conveyances in chain of title, 89 A.L.R. 1444.

Reformation on ground of mutual mistake regarding character or extent of estate or title imported by language used in instrument, 141 A.L.R. 826.

Incontestable clause as applicable to suit to reform insurance policy, 7 A.L.R.2d 504.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 A.L.R.2d 1180.

23-2-26. Accident or mistake in execution of power.

Accident or mistake in the execution of a power or causing the defective execution of the power will be remedied in equity.

History. — Orig. Code 1863, § 3061; Code 1868, § 3073; Code 1873, § 3128; Code 1882, § 3128; Civil Code 1895, § 3986; Civil Code 1910, § 4583; Code 1933, § 37-218.

RESEARCH REFERENCES

ALR. — Mistake by one party to contract as to identity of other party who acted in good faith, 147 A.L.R. 1171.

23-2-27. Equitable interference not authorized by mere ignorance of law.

Mere ignorance of the law on the part of the party himself, where the facts are all known and there is no misplaced confidence and no artifice, deception, or fraudulent practice is used by the other party either to induce the mistake of law or to prevent its correction, shall not authorize the intervention of equity.

History. — Orig. Code 1863, § 3054; Code 1868, § 3066; Code 1873, § 3121; Code 1882, § 3121; Civil Code 1895, § 3978; Civil Code 1910, § 4575; Code 1933, § 37-209.

JUDICIAL DECISIONS

O.C.G.A. § 23-2-27 does not prevent the granting of relief when all the facts are not known by reason of the fraud of one of the parties. Wellborn v. Johnson, 204 Ga. 389, 50 S.E.2d 16 (1948).

O.C.G.A. § 23-2-27 has no applica-

tion to a mutual mistake of law by both parties. Superior Ins. Co. v. Dawkins, 229 Ga. App. 45, 494 S.E.2d 208 (1997).

Because a mutual mistake of law was not a valid reason to nullify the parties' choice of Delaware law in order to uphold a right of first refusal, the parties' settlement agreement was not subject to reformation due to an alleged mutual mistake. Thus, under Delaware law, the right was properly declared invalid under the rule against perpetuities. CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Group, Inc., 283 Ga. 426, 659 S.E.2d 359 (2008).

Equitable relief requires inequitable conduct by other party. — Equity has jurisdiction to reform a written instrument when there has been ignorance or mistake on the part of one of the parties, accompanied by fraud or inequitable conduct on the part of the other party. Wellborn v. Johnson, 204 Ga. 389, 50 S.E.2d 16 (1948).

If the fraud or inequitable conduct complained of consists of an alleged misrepresentation of fact, it is immaterial whether the party making the misrepresentation knows it to be false or not; it is nonetheless fraud in law, even though not fraud in fact. Wellborn v. Johnson, 204 Ga. 389, 50 S.E.2d 16 (1948).

A simple mistake by a party as to the legal effect of an agreement which one executes, or as to the legal result of an act which one performs, is no ground for either defensive or affirmative relief. Robbins v. National Bank, 241 Ga. 538, 246 S.E.2d 660 (1978).

Mistake in opinion or mental conclusion not ground for relief. — Mistake of a past or present fact may warrant equitable relief, but a mistake in opinion or mental conclusion as to an uncertain future event is not ground for relief. Atkinson v. Atkinson, 254 Ga. 70, 326 S.E.2d 206 (1985).

Cited in Sapp v. Ritch, 169 Ga. 33, 149 S.E. 636 (1929); Paris v. Treadaway, 173 Ga. 639, 160 S.E. 797 (1931); Dunson v. First Nat'l Bank, 175 Ga. 79, 164 S.E. 815 (1932); Nalley v. New York Life Ins. Co., 48 F. Supp. 470 (N.D. Ga. 1943); Wood v. Claxton, 199 Ga. 809, 35 S.E.2d 455 (1945); Stein Steel & Supply Co. v. K. & L. Enters., Inc., 97 Ga. App. 71, 102 S.E.2d 99 (1958).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 34.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Ignorance of legal right to avoid contract or conveyance made during infancy as affecting ratification thereof upon attaining majority, 5 A.L.R. 137.

Right to cancellation in equity of an instrument not invalid on its face in which one is named as a party without his consent, 51 A.L.R. 867.

Misrepresentation as to tax law as within rule that party to contract or other instrument may not rely upon misrepresentations as to matters of law, 153 A.L.R. 538.

Misrepresentation as to matters of foreign law as actionable, 24 A.L.R.2d 1039.

23-2-28. Equitable interference not authorized by mutual ignorance of fact; mistake in judgment of value.

Ignorance of a fact by both parties shall not justify the interference of equity; nor shall a mistake in judgment or opinion merely as to the value of property authorize such interference.

History. — Orig. Code 1863, § 3060; Code 1868, § 3072; Code 1873, § 3127; Code 1882, § 3127; Civil Code 1895, § 3985; Civil Code 1910, § 4582; Code 1933, § 37-210.

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Lack of knowledge is not considered a mistake of fact for purposes of reformation. B.L. Ivey Constr. Co. v. Pilot Fire & Cas. Co., 295 F. Supp. 840 (N.D. Ga. 1968).

A mere mistake in judgment or opinion as to the value of property does not authorize interference by the courts. Hargrove v. Bledsoe, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

Cited in Beddingfield v. Old Nat'l Bank & Trust Co., 175 Ga. 172, 165 S.E. 61 (1932); Dobbs v. Perlman, 59 Ga. App. 770, 2 S.E.2d 109 (1939); Sawyer Coal & Ice Co. v. Kinnett-Odom Co., 192 Ga. 166, 14 S.E.2d 879 (1941); Orient Ins. Co. v. Dunlap, 193 Ga. 241, 17 S.E.2d 703 (1941); Nalley v. New York Life Ins. Co., 48 F. Supp. 470 (N.D. Ga. 1943); City of Jefferson v. Trustees of Martin Inst., 199 Ga. 71, 33 S.E.2d 354 (1945); Wheeler v. Poole, 204 Ga. 477, 50 S.E.2d 326 (1948); Adler v. Adler Co., 205 Ga. 818, 55 S.E.2d 13 (1949); James v. Tarpley, 209 Ga. 421, 73 S.E.2d 188 (1952); Cline v. Schuster, 221 Ga. 653, 146 S.E.2d 732 (1966); Long v. Walls, 226 Ga. 737, 177 S.E.2d 373 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 22.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Conscious ignorance of fact, as distinguished from mistake of fact, as ground for reformation of contract, 137 A.L.R. 908.

Relief, by way of rescission or adjustment of purchase price, for mutual mistake as to quantity of land, where contract of sale fixes compensation at a specified rate per acre or other area unit, 153 A.L.R. 4.

Mistake as to existence, practicability of removal, or amount of minerals as ground for relief from mineral lease, 163 A.L.R. 878.

Relief by way of rescission or adjustment of purchase price for mutual mistake as to quantity of land, where the sale is in gross, 1 A.L.R.2d 9.

Effect, as between stockbroker and customer, of broker's mistaken sale of security other than that intended by customer, 48 A.L.R.3d 513.

Vendor and purchaser: mutual mistake as to physical condition of realty as ground for rescission, 50 A.L.R.3d 1188.

Modern status of rules as to avoidance of release of personal injury claim on ground of mistake as to nature and extent of injuries, 13 A.L.R.4th 686.

23-2-29. Equitable interference not authorized by failure to exercise diligence; ignorance of fact absent fraud.

If a party, by reasonable diligence, could have had knowledge of the truth, equity shall not grant relief; nor shall the ignorance of a fact known to the opposite party justify an interference if there has been no misplaced confidence, misrepresentation, or other fraudulent act.

History. — Orig. Code 1863, § 3059; Code 1868, § 3071; Code 1873, § 3126; Code 1882, § 3126; Civil Code 1895, § 3984; Civil Code 1910, § 4581; Code 1933, § 37-211.

Law reviews. — For article, "Limitations on the Meaning and Impact of DeGarmo v. DeGarmo," see 4 Ga. St. B.J. 20 (1998).

JUDICIAL DECISIONS

Analysis

General Consideration
Reasonable Diligence
1. In General
2. Duty to Read Written Instruments

General Consideration

This section was not intended to lodge any arbitrary discretion in judge or jury to deny reformation on the ground that the party seeking relief could by reasonable diligence have had knowledge of the mistake. Bender v. Randall Bros., 189 Ga. 197, 5 S.E.2d 889 (1939).

Elements essential to equitable relief. — Two essential elements must affirmatively appear before a court of equity will be authorized to relieve a purchaser from the purchaser's bid because of mistake of fact; the exercise of ordinary diligence in discovering the truth, and the fact that the relief will not prejudicially affect the rights of anyone. Kurfees v. Davis, 178 Ga. 429, 173 S.E. 157 (1934).

Equity will not relieve a person from the person's erroneous acts or omissions resulting from the person's own negligence. Mangham v. Hotel & Restaurant Supply Co., 107 Ga. App. 619, 131 S.E.2d 74 (1963).

No basis for reformation. — Any possible violation of a fiduciary bond which remained between a city and a law firm as a result of a prior attorney-client relationship provided no basis for reforming an amended lease because there was no indication that the law firm was a party to its attorney's alleged duplicity and there was no proof in the record of any occurrence which prevented the city from reading the amended lease prior to executing the document. City of College Park v. Sheraton Savannah Corp., 235 Ga. App. 561, 509 S.E.2d 371 (1998).

An insurer was entitled to reformation of a policy when coverage of a vehicle was extended at the insured's request, after the vehicle was involved in an accident; even though the insurer could have inquired before extending the coverage, the insured was not prejudiced by the insurer's action and would obtain a windfall absent reformation of the contract. Cotton States Mut. Ins. Co. v. Woodruff, 215 Ga. App. 511, 451 S.E.2d 106 (1994).

Specific performance warranted in foreclosure sale. — Superior court did not err in granting a purchaser summary judgment in the purchaser's action seeking specific performance pursuant to O.C.G.A. § 23-2-131 and requiring a mortgage company to deliver a deed conveying certain property because the company failed to demonstrate any merit in the company's contention that the superior court improperly refused to invoke the court's equitable power to relieve the company from performing under the foreclosure sale contract on the ground that the opening bid the company set forth was a mistake. Because the dollar amount of the high bid at the foreclosure sale alone made it immediately apparent that there had been a mistake, a reasonable inference arose that had reasonable diligence been employed before the foreclosure sale, the alleged unilateral mistake would not have occurred. Decision One Mortg. Co., LLC v. Victor Warren Props., Inc., 304 Ga. App. 423, 696 S.E.2d 145 (2010).

Equitable interference not authorized in quiet title action. — Trial court did not err in granting a bank and purchasers summary judgment in a son's action to quiet title to a parcel of land because the son did not act with reasonable diligence to verify that a house was located on the land that the son received under a deed, and the purchasers would be prejudiced if the son were granted relief. Haffner v. Davis, 290 Ga. 753, 725 S.E.2d 286 (2012).

Constructive trust denied due to laches. — Former wife was not entitled to impose a constructive trust on her former husband's military pension pursuant to O.C.G.A. § 53-12-132 because she failed to object to the absence of any provision

General Consideration (Cont'd)

for the pension in their divorce decree for 12 years and failed to bring suit until five years after payments allegedly became due. Davis v. Davis, 310 Ga. App. 512, 713 S.E.2d 694 (2011).

Cited in Harrison v. Hester, 160 Ga. 865, 129 S.E. 528 (1925); Paris v. Treadaway, 173 Ga. 639, 160 S.E. 797 (1931); McCommons v. Greene County, 53 Ga. App. 171, 184 S.E. 897 (1936); Dobbs v. Perlman, 59 Ga. App. 770, 2 S.E.2d 109 (1939); J. Kuniansky, Inc. v. Ware, 192 Ga. 488, 15 S.E.2d 783 (1941); Hill v. Agnew, 202 Ga. 759, 44 S.E.2d 653 (1947); Loyd v. Loyd, 203 Ga. 775, 48 S.E.2d 365 (1948); Whitfield v. Whitfield, 204 Ga. 64, 48 S.E.2d 852 (1948); Tillman v. Byrd, 211 Ga. 918, 89 S.E.2d 479 (1955); Peerless Cas. Co. v. Housing Auth., 228 F.2d 376 (5th Cir. 1955); Charles v. Simmons, 215 Ga. 794, 113 S.E.2d 604 (1960); Dixie Belle Mills, Inc. v. Specialty Mach. Co., 217 Ga. 104, 120 S.E.2d 771 (1961); Cline v. Schuster, 221 Ga. 653, 146 S.E.2d 732 (1966); Vinson v. Citizens & S. Nat'l Bank, 223 Ga. 54, 153 S.E.2d 436 (1967); D.H. Overmyer Co. v. Joe Summers Roofing Co., 120 Ga. App. 188, 169 S.E.2d 821 (1969); Sikes v. Sikes, 231 Ga. 105, 200 S.E.2d 259 (1973); Martin v. Heard, 239 Ga. 816, 238 S.E.2d 899 (1977); Garden of Eden, Inc. v. Eastern Sav. Bank, 244 Ga. 63, 257 S.E.2d 897 (1979); FDIC v. Lattimore Land Corp., 656 F.2d 139 (5th Cir. 1981); Gulf Life Ins. Co. v. Folsom, 256 Ga. 400, 349 S.E.2d 368 (1986); Beasley v. Wachovia Bank, 277 Ga. App. 698, 627 S.E.2d 417 (2006); Levenson v. Word, 294 Ga. App. 104, 668 S.E.2d 763 (2008).

Reasonable Diligence

1. In General

Courts of equity grant relief only in favor of the diligent. City of Jefferson v. Trustees of Martin Inst., 199 Ga. 71, 33 S.E.2d 354 (1945).

The standard is one of reasonable diligence, and the defrauded party is not bound to exhaust all means at the party's command to ascertain the truth before relying upon the representations. Funding Sys. Leasing Corp. v. Pugh, 530 F.2d 91 (5th Cir. 1976).

Equity requires diligence in the protection of one's own rights. Phillips v. Hayes, 212 Ga. 148, 91 S.E.2d 19 (1956).

Equity requires diligence, and will not do for one that which one could have done for oneself but for one's own negligence. Glens Falls Indem. Co. v. Liberty Mut. Ins. Co., 202 Ga. App. 752, 44 S.E.2d 543 (1947).

While equity will, on reasonable application, and under proper circumstances, relieve a party from the injurious consequences of an act done under a mistake of fact, it will not do so if such party could, by reasonable diligence, have ascertained the truth as to the matter concerning which the mistake was made. Adler v. Adler Co., 205 Ga. 818, 55 S.E.2d 139 (1949).

The duty rests upon a party who seeks to rescind a contract on the ground of fraud, to make such effort to discover the fraud as would in law amount to ordinary diligence. Tingle v. Seignious, 212 Ga. 71, 90 S.E.2d 408 (1955).

If one has made a bad bargain by one's failure to acquaint oneself with facts which were easily ascertainable, a court of equity will not aid one in rescinding one's contract to purchase by decreeing a cancellation of the contract. Tingle v. Seignious, 212 Ga. 71, 90 S.E.2d 408 (1955).

While former Code 1933, § 37-207 (see O.C.G.A. § 23-2-31) provides that equity may rescind and cancel a written contract upon the ground of mistake of fact material to the contract of one party only, ignorance of fact is no cause for rescinding a contract; and when by reasonable diligence the plaintiff could have ascertained the extent of the plaintiff's injuries, and there was no necessity for the plaintiff's rushing into a settlement, former Code 1933, § 3-1004 (see O.C.G.A. § 9-3-33) gave the plaintiff two years in which to bring an action to recover for such injuries, a court of equity will not relieve the plaintiff from the injurious, unwise, or disadvantageous consequences of the plaintiff's own act in executing a release. James v. Tarpley, 209 Ga. 421, 73 S.E.2d 188 (1952).

When two contracting parties deal at

arms length with one another, and a written instrument is entered into and signed, and there is no evidence of artifice or fraud, and each party had ample opportunity to inform oneself as to the amounts claimed due, and a party negligently omitted to take such precautions as would reasonably serve to protect oneself, the defense of mistake of fact, if there is one, is obviously caused by the party's own neglect and is not available as a defense. Berry v. Atlas Metals, Inc., 152 Ga. App. 437, 263 S.E.2d 179 (1979).

A court of equity will not relieve a vendor of land from the vendor's own negligence in not ascertaining facts which the vendor could have ascertained by diligence, the vendee using no artifice or fraudulent scheme in order to prevent the vendor from ascertaining facts which might have prevented the vendor from executing the deed sought to be canceled on account of the alleged fraud on the part of the vendee. Browning v. Richardson, 181 Ga. 413, 182 S.E. 516 (1935).

Reasonable efforts in bidding contracts. — A contractor who has bid for the excavation of highway sites on a basis of "unclassified material" may not, under the guise of mistake of fact, seek additional compensation in an action at law because the material excavated contained a higher percentage of rock than it expected, even though its only information at the time of the bid was results of test borings made available to it by the highway department (now Department of Transportation), when it was specifically stipulated that the data were not guaranteed and did not bind the department; when the department furnished all information which it had available, made no attempt to conceal actual conditions, and stipulated the provisional character of its tests, when the contractor had equal opportunity with the department to conduct its own investigation, and when the parties with knowledge of these facts elected to contract on a basis of material moved rather than to contract on a basis of the percentage of dirt and rock after removal. State Hwy. Dep't v. MacDougald Constr. Co., 102 Ga. App. 254, 115 S.E.2d 863 (1960).

Materialmen are charged with knowledge of the premises upon which they filed their claim of lien, with knowledge of the premises to which they delivered the materials, and where they knew that these premises differed, in plenty of time to properly record a claim of lien as required by law, they cannot seek the aid of a court of equity to relieve them from their own negligence. King v. Rutledge, 208 Ga. 172, 65 S.E.2d 801 (1951).

Plaintiff's petition to cancel and declare void the plaintiff's acknowledgement of service and to set aside the judgment probating a will on the alleged ground of fraud failed to state a cause of action for the relief sought, since the plaintiff by an exercise of the slightest degree of diligence could have ascertained and asserted in the probate proceeding the falsity of the act upon which the plaintiff relied to set aside the probate judgment. Ingram v. Rooks, 221 Ga. 701, 146 S.E.2d 743 (1966).

Due diligence to ascertain truth. — When the terms of an instrument express the intent of the parties at the time the contract is made, as the parties are then informed, in the absence of any allegation of fraud, misrepresentation, or misplaced confidence, equity will not interfere to relieve on account of ignorance of a fact by one of the parties, if by the exercise of due diligence one might have ascertained the truth. Hargrove v. Bledsoe, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

While the doctrine of caveat emptor would charge the purchaser with looking out for the title which the seller had to the tract offered for sale as the seller's, it would not charge the purchaser with looking out for the boundaries of that tract when the seller undertook to locate and point them out, thus professing to know them sufficiently to enable them to furnish this information to purchasers instead of leaving the latter to their own resources in acquiring the information. Bonner v. Cotton, 223 Ga. 843, 159 S.E.2d 61 (1968).

Reformation of a deed. — Trial court properly ordered reformation of a deed of assent to include an entire eight acre tract of land as opposed to only a partial strip because reformation was not barred by the seven-year statute of limitations since the seller was not prejudiced as the deed

Reasonable Diligence (Cont'd)
1. In General (Cont'd)

should have been corrected previously, thus, equitable relief under O.C.G.A. § 23-2-32(b) was appropriate. Ehlers v. Upper West Side, LLC, 292 Ga. 151, 733 S.E.2d 723 (2012).

2. Duty to Read Written Instruments

One executing a contract or deed has the duty to read it and that negligence in not reading it before it is sent to one who acted in good faith can bar reformation by the negligent party. B.L. Ivey Constr. Co. v. Pilot Fire & Cas. Co., 295 F. Supp. 840 (N.D. Ga. 1968).

Because there was no fraud that prevented siblings from reading a deed presented to them by their brother, which he allegedly represented as an easement, and no fiduciary relationship upon which they could have justifiably relied, the siblings should have discovered the alleged fraud when they signed the deed, and the seven-year statute of limitations expired seven years later. McCall v. Williams, 326 Ga. App. 99, 756 S.E.2d 217 (2014).

One about to sign a written instrument cannot rely blindly upon the representations of other parties as to its contents, and if, without an emergency or fraud inducing him not to read it, he signs without reading, he cannot hold the other party responsible for his statements, though they be false. Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385 (1942).

Any representation, act, or artifice intended to deceive, and which does deceive another, is such a fraud as may authorize cancellation of a written contract, but a party to a contract who can read must read or show a legal excuse for not doing so, and ordinarily, if fraud is the excuse, it must be such fraud as prevents the party from reading; nor in such case will a mere fraudulent statement by the opposite party or his agent as to the contents of the writing furnish a legal excuse. And where the contract is a deed to land, the rule will generally apply to the grantee as well as the grantor. Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385 (1942).

Where two contracting parties deal with each other at arms' length and on equal terms, and where there is no such confidential relation between them as to justify special confidence reposed by one in the other, a written instrument entered into between them cannot be set aside upon the ground that the party seeking to be relieved was induced to enter in and sign the instrument in consequence of fraudulent representations as to its contents upon the part of the adverse party, when it appears that the party signing could read, that there was nothing to prevent him from reading the instrument, but that he did not do so, that there was no sufficient excuse for his failing to do so, but he signed after he had full opportunity to inform himself as to the terms of the instrument by reading it, but negligently omitted to read the same, when he could thus have informed himself of its contents. Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385 (1942).

Where one, while negotiating for the purchase of realty, has an opportunity to examine it before agreeing to buy, but fails to do so and voluntarily relies on statements made by the seller concerning its character and value, a written contract to sell and purchase the property subsequently executed by the contracting parties will not, on petition therefor by the purchaser, be rescinded and set aside because of the falsity of such statements, unless some fraud or artifice was practiced by the seller to prevent such examination by the purchaser; and this is true although the purchaser in agreeing to buy relied upon the seller's representations as to the character and value of the property as being true, and in consequence of such reliance acted to his injury. Tingle v. Seignious, 212 Ga. 71, 90 S.E.2d 408 (1955).

Where plaintiff signed a deed which was read to her by an attorney which she did not read herself, and there was no evidence that there were emergency circumstances of disabilities preventing her from reading the deed, the mere fact that the plaintiff signed the deed in a room where the shades were not put up and the blinds were not open, where it does not appear that she could not have raised the shades nor opened the

blinds and let in sufficient light by which she could read the deed, is insufficient as an excuse for her not reading the deed and becoming acquainted with its contents before she signed it. McCommons v. Greene County, 53 Ga. App. 171, 184 S.E. 897 (1936).

Equity will grant no relief in favor of one who buys land when he fails to exercise any diligence for his protection and asserts that he blindly relied on the representations of the seller as to matters of which he could have informed himself, and the same is true in the purchase of a stock of merchandise and fixtures. Holmes v. Walker, 207 Ga. 582, 63 S.E.2d 359 (1951).

While the inability of a plaintiff vendor, in an alleged fraudulent land sale case, to read the English language would be a circumstance which should be considered in determining whether or not he has been defrauded, the fact of such inability is not of itself sufficient to authorize the rescission of a contract. Robertson v. Panlos, 208 Ga. 116, 65 S.E.2d 400 (1951).

As a general rule, fraud voids all contracts; however, this rule is not applied in its entirety and without reservation to written contracts, for the reason that misrepresentations and false statements will not be heard in contradiction of the terms of a valid written instrument, unless it should appear that the party signing the contract has been induced to sign by a fraud, trickery, artifice, or emergency happening at the time of such signing. Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 22, 34, 43, 45, 82.

C.J.S. — 30 C.J.S., Equity, § 47.

ALR. — Negligence in executing contract as affecting right to have it reformed, 81 A.L.R.2d 7.

Negligence as Precluding Rescission of Purchase Agreement for Unilateral Mistake, 43 A.L.R.7th Art. 5

23-2-30. Reformation and execution of contract in case of mistake distinguished.

A distinction exists between reforming a contract and executing a contract in case of mistake. To authorize the former, the court shall be satisfied by the evidence that the mistake was mutual; but the court may refuse to act in the latter case if the mistake is confined to the party refusing to execute.

History. — Orig. Code 1863, § 3057; Code 1868, § 3069; Code 1873, § 3124; Code 1882, § 3124; Civil Code 1895, § 3981; Civil Code 1910, § 4578; Code 1933, § 37-208.

JUDICIAL DECISIONS

Analysis

General Consideration
Reformation of Contract
Proof of Mistake

General Consideration

The relief accorded by this section is relief which can be granted only by equity; in a simple action at law on a promissory note it is unavailable. Franklin v. Sea Island Bank, 111 Ga. App. 182, 141 S.E.2d 121 (1965).

Cited in Wachovia Bank & Trust Co. v. Jones, 166 Ga. 747, 144 S.E. 256 (1928); Paris v. Treadaway, 173 Ga. 639, 160 S.E. 797 (1931); Cheatham v. Palmer, 178 Ga. 223, 172 S.E. 462 (1934); Sawyer Coal & Ice Co. v. Kinnett-Odom Co., 192 Ga. 166, 14 S.E.2d 879 (1941); Orient Ins. Co. v. Dunlap, 193 Ga. 241, 17 S.E.2d 703 (1941); Wheeler v. Poole, 204 Ga. 477, 50 S.E.2d 326 (1948); William H. Benton Co. v. Irvindale Dairies, Inc., 224 Ga. 780, 164 S.E.2d 819 (1968); Hurst v. McDaniel, 159 Ga. App. 702, 285 S.E.2d 40 (1981); Fulghum v. Kelly, 255 Ga. 652, 340 S.E.2d 589 (1986); Brannen v. Gulf Life Ins. Co., 201 Ga. App. 241, 410 S.E.2d 763 (1991); Curry v. Curry, 267 Ga. 66, 473 S.E.2d 760 (1996).

Reformation of Contract

Reformation requires mutual mistake. — Equity in a proper case may reform a written contract because of fraud on one side and mistake on the other; a contract may also be reformed for a mistake of both parties, but the evidence must show that the mistake was mutual. Helton v. Shellnut, 186 Ga. 185, 197 S.E. 287 (1938).

Equity will not reform a written contract on account of a mistake unless the mistake was one of both parties. Some particular mutual mistake and how it occurred must be alleged and plainly shown. Rawson v. Brosnan, 187 Ga. 624, 1 S.E.2d 423 (1939).

A mistake in reference to the description of land conveyed on the part of one grantee, acting on behalf of other grantees who were absent, is a mistake on the part of all of them; and where the same mistake was made by the grantor, there would be a mistake of all the parties, within the rule as to mutuality. Lifsey v. Mims, 193 Ga. 780, 20 S.E.2d 32 (1942).

Reformation as applied to a contract is a remedy cognizable in equity for the purpose of correcting an instrument so as to make it express the true intention of the parties, where from some cause, such as fraud, accident, or mistake it does not express such intention. The remedy is not available for the purpose of making a new and different contract for the parties, but is confined to establishment of the actual agreement. Deck v. Shields, 195 Ga. 697, 25 S.E.2d 514 (1943).

A petition for reformation of a written contract will lie where by mistake of the draftsman and by oversight of the parties, the writing does not embody or fully express the real contract of the parties. McLoon v. McLoon, 220 Ga. 18, 136 S.E.2d 740 (1964).

Although equity will not reform a written contract because of mistake as to the contents of the writing on the part of the complaining party, who is able to read but fails to do so, where no sufficient excuse appears as to why such party did not read the contract, such principle has not been extended to cases in which it is sought to reform written instruments on the ground of mutual mistake of fact. In all cases where the form of the conveyance or instrument is, by mutual mistake, contrary to the intention of the parties in their contract, equity will interfere to make it conform thereto. Eaton Yale & Towne, Inc. v. Strickland, 228 Ga. 430, 185 S.E.2d 923 (1971).

The mere failure to discover a conflict between the terms of an oral contract as to what a policy of insurance is to contain and what it actually contains until after a loss occurs is a circumstance to be considered by the jury in determining the truth of the issue, but such failure to discover the discrepancy will not bar the reformation of the contract as a matter of law. Georgia Farm Bureau Mut. Ins. Co. v. Wall, 242 Ga. 176, 249 S.E.2d 588 (1978).

Insurance contracts are not immune to suits for reformation, even where the insurance company was acting through an agent whose actions may have been unauthorized. Georgia Farm Bureau Mut. Ins. Co. v. Wall, 242 Ga. 176, 249 S.E.2d 588 (1978).

The failure of a party to read a contract which is not signed by that party, such as a policy of insurance, does not bar refor-

mation as a matter of law. Georgia Farm Bureau Mut. Ins. Co. v. Wall, 242 Ga. 176, 249 S.E.2d 588 (1978).

Proof of Mistake

When mistake is relied on, the petition must allege the particular mistake and show how it occurred. Helton v. Shellnut, 186 Ga. 185, 197 S.E. 287 (1938).

Evidence of mistake must be clear, unequivocal and decisive. — To authorize a verdict reforming a deed upon the ground of mutual mistake, the evidence, like the petition, should at least by inference show the particular mistake and illustrate how it occurred; and the evidence must be clear, unequivocal, and decisive as to the mistake. Helton v. Shellnut, 186 Ga. 185, 197 S.E. 287 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Equity, §§ 36 et seq., 53 et seq.

Am. Jur. Pleading and Practice Forms. — 21A Am. Jur. Pleading and Practice Forms, Reformation of Instruments, § 26 et seq.

C.J.S. — 30A C.J.S., Equity, §§ 41 et seq., 91.

76 C.J.S., Reformation of Instruments, § 1 et seq.

ALR. — Mistake in lease as ground for relief, 26 A.L.R. 472.

Relief from contract of sale because of mistake as to amount of commodity which it calls for, 31 A.L.R. 384.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 44 A.L.R. 78; 79 A.L.R.2d 1180.

Attempt to reform contract as election of remedies precluding action to enforce contract as written or vice versa, 49 A.L.R. 1513.

Right to reformation of conveyance as depending upon consideration, 69 A.L.R. 423; 128 A.L.R. 1299.

Mistaken belief that contract bound one's principal, and not himself personally, as ground for reformation, 71 A.L.R. 1307.

Reformation of memorandum relied upon to take an oral contract out of the statute of frauds, 73 A.L.R. 99.

Effect of alteration intended merely to correct mistake in instrument so as to conform it to original understanding, 73 A.L.R. 652.

Right of present claimant of title as against original or intermediate grantor to reformation to correct error in description common to conveyances in chain of title, 89 A.L.R. 1444.

Jurisdiction of court of law to avoid or reform release of claim for personal injuries on ground of mutual mistake, 96 A.L.R. 1144.

When does limitation or laches commence to run against suit to reform an instrument, 106 A.L.R. 1338.

Right of third person entitled to maintain an action at law on a contract between other parties, or to garnish indebtedness thereunder, to maintain a suit for its reformation, 112 A.L.R. 909.

Right of insurer to reformation of policy or other relief because of its own error, not due to misrepresentation by insured, in computing premiums, indemnity, or other benefits or options under policy, 125 A.L.R. 1058.

Reformation of instrument on ground of mutual mistake as to legal significance of the terms used, 135 A.L.R. 1452.

Reformation on ground of mutual mistake regarding character or extent of estate or title imported by language used in instrument, 141 A.L.R. 826.

Mistake by one party to contract as to identity of other party who acted in good faith, 147 A.L.R. 1171.

Mistake as to existence, practicability of removal, or amount of minerals as ground for relief from mineral lease, 163 A.L.R. 878.

Right, after foreclosure, to reformation on ground of erroneous description originating in mortgage, 172 A.L.R. 655.

Incontestable clause as applicable to suit to reform insurance policy, 7 A.L.R.2d 504.

Negligence in executing contract as affecting right to have it reformed, 81 A.L.R.2d 7.

Reformation of property insurance policy to correctly identify the person or interest insured, 25 A.L.R.3d 580.

Reformation of insurance policy to correctly identify risks and causes of loss, 32 A.L.R.3d 661.

Reformation of usurious contract, 74 A.L.R.3d 1239.

23-2-31. Rescission for unilateral mistake of fact.

Equity will not reform a written contract unless the mistake is shown to be the mistake of both parties; but it may rescind and cancel upon the ground of mistake of fact material to the contract of one party only.

History. — Civil Code 1895, § 3982; Civil Code 1910, § 4579; Code 1933, § 37-207.

History of Code section. — This Code section is derived from the decision in Werner v. Rawson, 89 Ga. 619, 15 S.E. 813 (1892).

Law reviews. — For article, "Limitations on the Meaning and Impact of DeGarmo v. DeGarmo," see 4 Ga. St. B.J. 20 (1998).

JUDICIAL DECISIONS

Analysis

General Consideration
Reformation
Rescission
1. Insolvency
2. Ignorance of Fact
3. Proof
4. Clerical Error

General Consideration

The relief accorded by this section is relief which can be granted only by equity; in a simple action at law on a promissory note it is unavailable. Franklin v. Sea Island Bank, 111 Ga. App. 182, 141 S.E.2d 121 (1965).

Cited in Brown v. Carmichael, 149 Ga. 548, 101 S.E. 124 (1919); Hooper v. Rucker, 153 Ga. 306, 111 S.E. 901 (1922); Edwards v. Rozar, 155 Ga. 170, 116 S.E. 313 (1923); Williams v. Williams, 155 Ga. 622, 118 S.E. 195 (1923); Paris v. Treadaway, 173 Ga. 639, 160 S.E. 797 (1931); Sawyer Coal & Ice Co. v. Kinnett-Odom Co., 192 Ga. 166, 14 S.E.2d 879 (1941); Orient Ins. Co. v. Dunlap, 193 Ga. 241, 17 S.E.2d 703 (1941); Brooks v. Northwestern Mut. Life Ins. Co., 193 Ga. 522, 18 S.E.2d 860 (1942); Nalley v. New York Life Ins. Co., 48 F. Supp. 470 (N.D. Ga. 1943); Scott v. Gillis, 202 Ga. 220, 43 S.E.2d 95 (1947); Findley v. City of Vidalia, 204 Ga. 279, 49 S.E.2d 658 (1948); Wheeler v. Poole, 204 Ga. 477, 50 S.E.2d 326 (1948); Hood v. Connell, 204 Ga. 782, 51 S.E.2d 853 (1949); Jackson v. Brown, 209 Ga. 78, 70 S.E.2d 756 (1952); Farmers Whse. of Pelham, Inc. v. Collins, 220 Ga. 141, 137 S.E.2d 619 (1964); Cline v. Schuster, 221 Ga. 653, 146 S.E.2d 732 (1966); Westbrook v. Nationwide Ins. Co., 113 Ga. App. 299, 147 S.E.2d 819 (1966); Hartford Accident & Indem. Co. v. Walka Mt. Camp No. 565, Woodmen of World, Inc., 224 Ga. 194, 160 S.E.2d 833 (1968); William H. Benton Co. v. Irvindale Dairies, Inc., 224 Ga. 780, 164 S.E.2d 819 (1968); Seaboard Constr. Co. v. Clifton, 121 Ga. App. 247, 173 S.E.2d 436 (1970); Citizens Bank v. Barber, 123 Ga. App. 507, 181 S.E.2d 545 (1971).

Reformation

When mistake is relied on, the petition must allege the particular mis-

take and show how it occurred. Helton v. Shellnut, 186 Ga. 185, 197 S.E. 287 (1938).

The fact that a complainant does not in express terms allege that an instrument was erroneously executed through mutual mistake does not render it insufficient in law, if it alleges facts from which such a conclusion is reasonably deducible. Steadham v. Cobb, 183 Ga. 30, 196 S.E. 730 (1938).

A mistake that will justify reformation must be a mutual mistake. McCullough v. Kirby, 204 Ga. 738, 51 S.E.2d 812 (1949).

Mutual mistake can lead to reformation. — Where the intent of the parties and their mutual mistake in having failed to notice the discrepancy between that intent and the written document was established by the evidence, the fact that the discrepancy resulted from the landlord's error as scrivener did not preclude reformation of the lease. Zaimis v. Sharis, 275 Ga. 532, 570 S.E.2d 313 (2002).

In a lender's suit for reformation of a security deed to reflect that a different parcel owned by the borrower was the collateral, rather than the parcel described in the deed, the trial court erred in granting summary judgment for the borrower because inconsistencies in the loan documents raised an issue of fact as to whether there was a mistake. JPMorgan Chase Bank v. Cronan, No. A20A0378, 2020 Ga. App. LEXIS 358 (June 18, 2020).

Equity will not reform a written contract on account of a mistake unless the mistake was one of both parties; some particular mutual mistake and how it occurred must be alleged and plainly shown. Rawson v. Brosnan, 187 Ga. 624, 1 S.E.2d 423 (1939).

Rescission

1. Insolvency

Insolvency as basis for rescission of contract. — While an absolute deed of conveyance will not be canceled, at the instance of the grantor, merely because of a breach by the grantee of a promise made by him, in consideration of which the deed was executed, and the remedy of the grantor in such a case is a suit for damages for such breach, yet where the grantee was insolvent, and 49 shares of stock were transferred to her in consideration of her learning the plaintiff's business and assisting in its operation, which service she failed and refused to render to the plaintiff, equity would decree a cancellation of the stock certificate and restore the same to the grantor. McGhee v. Minor, 188 Ga. 635, 4 S.E.2d 565 (1939).

The grantor may maintain an equitable action to rescind the contract if the grantee is insolvent, or where fraud is employed by the grantee in the procurement of the deed, or there are other special facts which would make rescission by the grantor an appropriate relief. Although insolvency is frequently relied upon, breach of a contract for care and maintenance of the grantor upon the property conveyed present such special facts as authorize rescission. Head v. Walker, 243 Ga. 108, 252 S.E.2d 440 (1979).

2. Ignorance of Fact

Ignorance of fact insufficient as basis for rescission of contract. — While this section provides that equity may rescind and cancel a written contract upon the ground of mistake of fact material to the contract of one party only, ignorance of fact is no cause for rescinding a contract; and where by reasonable diligence the plaintiff could have ascertained the extent of his injuries, and there was no necessity for his rushing into a settlement, § 9-3-33 giving him two years in which to bring an action to recover for such injuries, a court of equity will not relieve him from the injurious, unwise, or disadvantageous consequences of his own act in executing a release. James v. Tarpley, 209 Ga. 421, 73 S.E.2d 188 (1952).

When the intention of both the insurer and the insured as to the amount of the premium is expressed in the application, as corrected by the insurer as therein authorized, to be $302.90 per quarter, a mistake of the draftsman of the insurer in writing into the policy at another place the amount of the premium as being $750.48 per year, instead of what the insurer claims to have been intended, $750.48 per quarter, is obviously the unilateral mistake of the insurer alone, and

Rescission (Cont'd)
2. Ignorance of Fact (Cont'd)

there is neither mutuality nor fraud that would authorize reformation to conform with what the insurer claims to have been intended. Davis v. United Am. Life Ins. Co., 215 Ga. 521, 111 S.E.2d 488 (1959).

A contractor who has bid for the excavation of highway sites on a basis of "unclassified material" may not, under the guise of mistake of fact, seek additional compensation in an action at law because the material excavated contained a higher percentage of rock than it expected, even though its only information at the time of the bid was results of test borings made available to it by the highway department (now Department of Transportation), where it was specifically stipulated that the data were not guaranteed and did not bind the department; where the department furnished all information which it had available, made no attempt to conceal actual conditions, and stipulated the provisional character of its tests, where the contractor had equal opportunity with the department to conduct its own investigation, and where the parties with knowledge of these facts elected to contract on a basis of material moved rather than to contract on a basis of the percentage of dirt and rock after removal. State Hwy. Dep't v. MacDougald Constr. Co., 102 Ga. App. 254, 115 S.E.2d 863 (1960).

Wrong property foreclosed upon. — Trial court properly reformed security deed and declared that suing lender had first priority over certain tract of land since there was no doubt that parties intended for the tract to have been subject to the security deed alone; trial court also properly directed verdict in favor of suing lender as to its claim for rescission and cancellation of the deed it obtained when it mistakenly foreclosed on the wrong tract, as such relief was the proper remedy. DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 662 S.E.2d 141 (2008).

Mistake. — In a breach of contract action regarding a loan contract between the lender and its debtor, the debtor's failure to cite to facts in the record establishing that the $4,500 note was paid in full led to the conclusion that it was not, and the fact that the debtor might have made payments in excess of $25,000 regarding all the outstanding loans with the lender did not in and of itself prove that the $4,500 loan had been paid off. Jenkins v. Sallie Mae, Inc., 286 Ga. App. 502, 649 S.E.2d 802 (2007).

3. Proof

Equitable relief for unilateral mistake requires evidence of fraud. — Equity will grant appropriate relief for a mistake of fact by one party, accompanied by fraud on the part of the other, just as in cases where there is mutual mistake. J. Kuniansky, Inc. v. Ware, 192 Ga. 488, 15 S.E.2d 783 (1941).

4. Clerical Error

Error resulting in seven percent discrepancy in amount of bid. — Contractor was entitled to rescind its construction bid for a church building, after a clerical error resulted in a seven percent discrepancy in the amount of the bid, notwithstanding bidding instructions which prohibited the contractor from withdrawing the bid on the ground of "negligence." First Baptist Church v. Barber Contracting Co., 189 Ga. App. 804, 377 S.E.2d 717 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 33, 35, 39.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Rescission of sale of corporate stock on account of mutual mistake due to error in corporate books, 5 A.L.R. 255.

Relief from contract of sale because of mistake as to amount of commodity which it calls for, 31 A.L.R. 384.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 44 A.L.R. 78; 79 A.L.R.2d 1180.

Right to cancellation in equity of an

instrument not invalid on its face in which one is named as a party without his consent, 51 A.L.R. 867.

Unilateral mistake as basis of bill in equity to rescind the contract, 59 A.L.R. 809.

Mistaken belief that contract bound one's principal, and not himself personally, as ground for reformation, 71 A.L.R. 1307.

Reformation of memorandum relied upon to take an oral contract out of the statute of frauds, 73 A.L.R. 99.

Right of present claimant of title as against original or intermediate grantor to reformation to correct error in description common to conveyances in chain of title, 89 A.L.R. 1444.

Right of vendor in contract for sale or exchange of real property to bring suit for forfeiture, foreclosure, or rescission, or to quiet title or recover possession, without first giving notice, or making demand for possession, 94 A.L.R. 1239.

Action involving rescission or right to rescind contract and to recover amount paid thereunder as one at law or in equity, 95 A.L.R. 1000.

Jurisdiction of court of law to avoid or reform release of claim for personal injuries on ground of mutual mistake, 96 A.L.R. 1144.

Avoidance on ground of fraud, mistake, duress, or mental incompetency of otherwise validly effected change of beneficiaries of insurance policies, 105 A.L.R. 950.

Assignability of right to rescind or of right to return of money or other property as incident of rescission, 110 A.L.R. 849; 162 A.L.R. 743.

Right of third person entitled to maintain an action at law on a contract between other parties, or to garnish indebtedness thereunder, to maintain a suit for its reformation, 112 A.L.R. 909.

Rescission of contract as affecting right to recover damages for fraud in procuring it, 120 A.L.R. 1154.

Concealment of fact that one of parties to land contract was acting for third person, or misrepresentation as to identity of party for whom he was acting as reason for denying specific performance, or for rescission of contract, 121 A.L.R. 1162.

Right of insurer to reformation of policy or other relief because of its own error, not due to misrepresentation by insured, in computing premiums, indemnity, or other benefits or options under policy, 125 A.L.R. 1058.

Reformation on ground of mutual mistake regarding character or extent of estate or title imported by language used in instrument, 141 A.L.R. 826.

Mistake by one party to contract as to identity of other party who acted in good faith, 147 A.L.R. 1171.

Partial rescission of contract, 148 A.L.R. 417.

Mistake as to existence, practicability of removal, or amount of minerals as ground for relief from mineral lease, 163 A.L.R. 878.

Relief by way of rescission or adjustment of purchase price for mutual mistake as to quantity of land, where the sale is in gross, 1 A.L.R.2d 9.

Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental, strictly on time, 5 A.L.R.2d 993.

Venue of action for rescission or cancellation of contract relating to interests in land, 77 A.L.R.2d 1014.

Negligence in executing contract as affecting right to have it reformed, 81 A.L.R.2d 7.

Reformation of property insurance policy to correctly identify the person or interest insured, 25 A.L.R.3d 580.

Right of bank certifying check or note by mistake to cancel, or avoid effect of, certification, 25 A.L.R.3d 1367.

Vendor and purchaser: mutual mistake as to physical condition of realty as ground for rescission, 50 A.L.R.3d 1188.

Reformation of usurious contract, 74 A.L.R.3d 1239.

Requirements for and Confirmations of Bankruptcy Plans for Churches, Dioceses, and Archdioceses Under 11 U.S.C.A. § 1129, 36 A.L.R. Fed. 3d Art. 2.

Determinations Whether Federal Agency Actions Relating to Power Generation Operations Constituted Major Federal Actions for Purposes of § 102(2)(C) of National Environmental Policy Act (NEPA) (42 U.S.C.A. § 4332(2)(C)), 36 A.L.R. Fed. 3d Art. 3.

Federal Contractor's Right to Equitable Adjustment for Differing or Changed Site Conditions, 36 A.L.R. Fed. 3d Art. 7.

23-2-32. When negligent complainant granted relief.

(a) The negligence of the complaining party, preventing relief in equity, is that want of reasonable prudence, the absence of which would be a violation of legal duty.

(b) Relief may be granted even in cases of negligence by the complainant if it appears that the other party has not been prejudiced thereby.

History. — Civil Code 1895, § 3974; Civil Code 1910, § 4571; Code 1933, § 37-212.

History of Code section. — This Code section is derived from the decision in Werner v. Rawson, 89 Ga. 619, 15 S.E. 813 (1892).

Law reviews. — For article, "Limitations on the Meaning and Impact of DeGarmo v. DeGarmo," see 4 Ga. St. B.J. 20 (1998).

JUDICIAL DECISIONS

This section is a codification from the decision of Werner v. Rawson, 89 Ga. 619, 15 S.E. 813 (1892). McCollum v. Loveless, 187 Ga. 262, 200 S.E. 115 (1938); Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385 (1942); Hargrove v. Bledsoe, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

This section does not entitle a party to relief against the consequences of gross and inexcusable negligence in signing his name to a plain and unambiguous written instrument, when no fraud, artifice, or misrepresentation was employed to induce him to sign it, and when there is nothing to show that it did not embody the identical agreement which the other party actually intended to make. Holton Dodge, Inc. v. Baird, 118 Ga. App. 316, 163 S.E.2d 346 (1968).

Equity will not reform a written contract because of mistake as to the contents of the writing on the part of the complaining party (who was able to read), and fraud of the other which consists only in making false representations as to such contents, on which the complaining party relied as true because of confidence in the party making them; no fiduciary or confidential relation existed between the parties, and no sufficient excuse appears why the complaining party did not read the contract. This doctrine does not apply if the party seeking relief shows some good excuse for not reading the instrument. Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385 (1942).

When no confidential relationship between the parties is alleged, a court of equity will not relieve a vendor of land from his own negligence in not ascertaining facts which he could have ascertained by diligence, the vendee using no artifice or fraudulent scheme in order to prevent the vendor from ascertaining facts which might have prevented him from executing the deed sought to be canceled. Jackson v. Brown, 209 Ga. 78, 70 S.E.2d 756 (1952).

Petition of negligent complainant subject to motion to dismiss. — This section does not save a petition from a demurrer (now motion to dismiss) where the allegations, construed on demurrer (now motion to dismiss) most strongly against the petitioner, show affirmatively that the petitioner was guilty of negligence amounting to a violation of legal duty, and it does not appear that the other party was not prejudiced thereby. Glens Falls Indem. Co. v. Liberty Mut. Ins. Co., 202 Ga. App. 752, 44 S.E.2d 543 (1947).

It is not essential that complainants should be clear of all vestige of fault or negligence on their part. Dollar v. Fred W. Amend Co., 184 Ga. 432, 191 S.E. 696 (1937).

Negligence of the party complaining will not defeat the party's right to reformation, if the other party has not been prejudiced thereby. Sheldon v. Hargrose, 213 Ga. 672, 100 S.E.2d 898 (1957).

Negligence of elderly, illiterate individual. — A petition which alleges that an instrument in the form of a deed, which was signed by an elderly, illiterate man who thought he was executing a will, and prays for cancellation on the ground of mistake does not show, on its face, negligence amounting to a violation of a legal duty so as to render the petition demurrable (now subject to motion to dismiss). Jackson v. Jackson, 202 Ga. 634, 44 S.E.2d 250 (1947).

Reformation of a deed. — Trial court properly ordered reformation of a deed of assent to include an entire eight acre tract of land as opposed to only a partial strip because reformation was not barred by the seven-year statute of limitations since the seller was not prejudiced as the deed should have been corrected previously, thus, equitable relief under O.C.G.A. § 23-2-32(b) was appropriate. Ehlers v. Upper West Side, LLC, 292 Ga. 151, 733 S.E.2d 723 (2012).

Rescission notwithstanding prohibition of bid withdrawal for negligence. — Contractor was entitled to rescind its construction bid for a church building, where a clerical error had resulted in a seven percent discrepancy in the amount of the bid, notwithstanding bidding instructions which prohibited the contractor from withdrawing the bid on the ground of "negligence." First Baptist Church v. Barber Contracting Co., 189 Ga. App. 804, 377 S.E.2d 717 (1989).

Lack of diligence constitutes negligence. — When both the appellant and counsel for the appellant could have with reasonable diligence discovered that the note in question bore interest from the date of its execution, the failure to exercise such diligence was negligence, which precluded reformation on ground of mutual mistake, since the appellee has been prejudiced by that negligence. Cox v. Smith, 244 Ga. 280, 260 S.E.2d 310 (1979).

Questions of fact as to diligence prevented judgment of reformation. — In a suit by a shopping center mortgagee against an insurer and banks seeking damages after the insurer paid the mortgagor insurance proceeds for hail damage to the premises (and the mortgagor's agent fraudulently endorsed the check), the mortgagee was not entitled to summary judgment on the mortgagee's reformation claim based on its listing as a mortgagee/payee on the application and proof of loss form, but not in the policy, because there were issues as to its diligence in reviewing the policy. Auto-Owners Ins. Co. v. Hale Haven Props., 346 Ga. App. 39, 815 S.E.2d 574 (2018), cert. denied, No. S18C1423, 2019 Ga. LEXIS 75, cert. denied, No. S18C1418, 2019 Ga. LEXIS 88, cert. denied, No. S18C1421, 2019 Ga. LEXIS 92 (Ga. 2019), cert. denied, No. S18C1417, 2019 Ga. LEXIS 93 (Ga. 2019).

Courts of equity grant relief only in favor of the diligent, and equity does not relieve from a judgment which could have been prevented except for negligence on the part of the complaining party. West v. Downer, 218 Ga. 235, 127 S.E.2d 359 (1962).

Failure to make inquiry. — The failure of a petitioner to know the content defining the coverage of its insurance contract or to compare the facts and circumstances surrounding the injury to ascertain if it was covered thereby, and its failure to inquire of the employer or the Industrial Board (now Board of Workers' Compensation) as to the existence of an insurance contract with another insurance carrier that covered the injury, amounted to negligence on the part of the petitioner, and would not constitute such a mistake of fact as would render the agreement and the payments thereunder involuntary and, therefore, a basis for subrogation. Glens Falls Indem. Co. v. Liberty Mut. Ins. Co., 202 Ga. 752, 44 S.E.2d 543 (1947).

An insurer was entitled to reformation of a policy where coverage of a

vehicle was extended at the insured's request, after the vehicle was involved in an accident; even though the insurer could have inquired before extending the coverage, the insured was not prejudiced by the insurer's action and would obtain a windfall absent reformation of the contract. Cotton States Mut. Ins. Co. v. Woodruff, 215 Ga. App. 511, 451 S.E.2d 106 (1994).

Recovery of payment mistakenly paid. — In an action for money had and received, the plaintiff generally can recover a payment mistakenly made when that mistake was caused by his lack of diligence or his negligence in ascertaining the true facts and the other party would not be prejudiced by refunding the payment, subject to a weighing of the equities between the parties by the trier of fact. Gulf Life Ins. Co. v. Folsom, 256 Ga. 400, 349 S.E.2d 368 (1986) (relying solely on computer records); Graham v. Hogan, 185 Ga. App. 842, 366 S.E.2d 219 (1988).

Summary judgment for a retirement system was reversed because there were fact issues as to voluntary payment under O.C.G.A. § 13-1-13, and as to equitable estoppel under O.C.G.A. § 23-2-32, after the son claimed that the mother told the son that the benefits would continue to be paid after the mother's death; details of how the retirement system discovered the mother's death were needed to resolve the possibility that the son retained and spent the money in good faith. Applebury v. Teachers' Ret. Sys., 275 Ga. App. 194, 620 S.E.2d 452 (2005).

The voluntary payment doctrine did not bar a city's unjust enrichment and conversion claims filed against a construction contractor, as the contractor failed to show that: (1) a genuine issue of material fact remained over whether the city was negligent in ascertaining the true facts; and (2) any prejudice would result if the mistaken duplicate payment the city made to the contractor were returned to the city. D & H Constr. Co. v. City of Woodstock, 284 Ga. App. 314, 643 S.E.2d 826 (2007).

Defendants not prejudiced, plaintiff's alleged negligence no defense to claim for money had and received. — Lawyer falsely told clients that the clients' lawsuit was settled, paid the clients money the lawyer obtained by kiting checks from the law firm's bank accounts, and defrauded a relative into lending the lawyer money to cover the shortage in the accounts. As the relative's failure to fully investigate the facts before making the loan did not prejudice the clients, any negligence on the relative's part was not a defense under O.C.G.A. § 23-2-32 to the relative's claim against the clients for money had and received. Haugabook v. Crisler, 297 Ga. App. 428, 677 S.E.2d 355 (2009).

Considerations by jury in claim for money had and received. — The equities to be considered by the jury in the case of a claim for money had and received are: (1) the degree of negligence on the plaintiff's part in erroneously paying over the money, (2) the level of good faith with which the defendant acted in receiving and retaining the money, and (3) prejudice, i.e., whether the defendant's position has so changed that it would be unfair to require him to pay the money back. Gulf Life Ins. Co. v. Folsom, 907 F.2d 1115 (11th Cir. 1990).

In an action for money had and received, where the plaintiff was negligent, the plaintiff is entitled to get the plaintiff's money back—unless the jury decides that the plaintiff doesn't deserve it back or that the defendant deserves to keep it. Gulf Life Ins. Co. v. Folsom, 907 F.2d 1115 (11th Cir. 1990).

Effect of material change of position by payee of funds sought to be recovered. — The superior court did not err in ruling that a recipient of Medicaid reimbursement funds had so changed its position in reliance on its hospital-based classification during the period in question that it would be unjust to require it to refund the monies in question. Department of Medical Assistance v. Presbyterian Home, Inc., 200 Ga. App. 885, 409 S.E.2d 881 (1991), cert. denied, No. S91C1697, 1992 Ga. LEXIS 357 (1992).

Payment of late charges. — The voluntary payment doctrine barred claims for recovery of late fees paid by cable television subscribers under a service agreement with the cable company which stated that a late fee would be charged to a customer's account if payment was not received by the due date. Telescripps Ca-

ble Co. v. Welsh, 247 Ga. App. 282, 542 S.E.2d 640 (2000).

Wrong property foreclosed upon. — Trial court properly reformed security deed and declared that suing lender had first priority over certain tract of land since there was no doubt that parties intended for the tract to have been subject to the security deed alone; trial court also properly directed verdict in favor of suing lender as to its claim for rescission and cancellation of the deed it obtained when it mistakenly foreclosed on the wrong tract, as such relief was the proper remedy. DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 662 S.E.2d 141 (2008).

Company required to honor bid price on foreclosed property. — Superior court did not err in granting a purchaser summary judgment in its action seeking specific performance pursuant to O.C.G.A. § 23-2-131 requiring a mortgage company to deliver a deed conveying certain property because the company failed to demonstrate any merit in the company's contention that the superior court improperly refused to invoke the court's equitable power to relieve the company from performing under the foreclosure sale contract on the ground that the opening bid it set forth was a mistake. O.C.G.A. § 23-2-32(b) did not provide relief from the foreclosure sale contract because the company failed to show how the purchaser would not be prejudiced if the company were granted relief and the record was void of any evidence that there was no difference between the contract price and the fair market value of the real property. Decision One Mortg. Co., LLC v. Victor Warren Props., Inc., 304 Ga. App. 423, 696 S.E.2d 145 (2010).

O.C.G.A. § 23-2-32(b) did not apply to a son's action to quiet title to a parcel of land because the original grantor, the son's father, no longer owned the land, and buyers of the land were bona fide purchasers who had no notice of the mistake in the deed until two years after the purchasers' purchased the property from the bank. Haffner v. Davis, 290 Ga. 753, 725 S.E.2d 286 (2012).

Denial of request for reformation of contract held proper. — Trial court properly entered judgment in favor of a purchaser in a bank's action seeking reformation of a security deed and cancellation of the levy and sale of two lots; while O.C.G.A. § 23-2-32(b) stated that relief could be granted even in cases of negligence by the complainant if it appears that the other party has not been prejudiced thereby, the purchaser had begun making repairs and improving the property, and had spent $12,410 and continued to incur expenses, and thus, the trial court's finding that the purchaser would be prejudiced by the reformation sought by the bank was not clearly erroneous. First Nat'l Bank v. Carr, 260 Ga. App. 439, 579 S.E.2d 863 (2003).

Constructive trust denied due to laches. — Former wife was not entitled to impose a constructive trust on her former husband's military pension pursuant to O.C.G.A. § 53-12-132 because she failed to object to the absence of any provision for the pension in their divorce decree for 12 years and failed to bring suit until five years after payments allegedly became due. Davis v. Davis, 310 Ga. App. 512, 713 S.E.2d 694 (2011).

Cited in Harrison v. Hester, 160 Ga. 865, 129 S.E. 528 (1925); Crim v. Alston, 169 Ga. 852, 151 S.E. 807 (1930); Chapman v. Cassels Co., 180 Ga. 349, 179 S.E. 91 (1935); Young v. Hirsch, 187 Ga. 1, 199 S.E. 179 (1938); J. Kuniansky, Inc. v. Ware, 192 Ga. 488, 15 S.E.2d 783 (1941); Scott v. Gillis, 202 Ga. 220, 43 S.E.2d 95 (1947); Mulkey v. Spicer, 202 Ga. 592, 43 S.E.2d 661 (1947); Tillman v. Byrd, 211 Ga. 918, 89 S.E.2d 479 (1955); Flagg v. Hedrick, 215 Ga. 16, 108 S.E.2d 703 (1959); Cline v. Schuster, 221 Ga. 653, 146 S.E.2d 732 (1966); Finch v. McAloney, 222 Ga. 174, 149 S.E.2d 100 (1966); Vinson v. Citizens & S. Nat'l Bank, 223 Ga. 54, 153 S.E.2d 436 (1967); Long v. Walls, 226 Ga. 737, 177 S.E.2d 373 (1970); Eaton Yale & Towne, Inc. v. Strickland, 228 Ga. 430, 185 S.E.2d 923 (1971); J.C. Penney Co. v. West, 140 Ga. App. 110, 230 S.E.2d 66 (1976); Funding Sys. Leasing Corp. v. Pugh, 530 F.2d 91 (5th Cir. 1976); Garden of Eden, Inc. v. Eastern Sav. Bank, 244 Ga. 63, 257 S.E.2d 897 (1979); FDIC v. Lattimore Land Corp., 656 F.2d 139 (5th Cir. 1981); Atkinson v. Atkinson, 254 Ga.

70, 326 S.E.2d 206 (1985); Crane v. Adams-Cates Co., 256 Ga. 407, 350 S.E.2d 767 (1986); Brannen v. Gulf Life Ins. Co., 201 Ga. App. 241, 410 S.E.2d 763 (1991); Baghdady v. Central Life Ins. Co., 224 Ga. App. 170, 480 S.E.2d 221 (1996); Beasley v. Wachovia Bank, 277 Ga. App. 698, 627 S.E.2d 417 (2006); Levenson v. Word, 294 Ga. App. 104, 668 S.E.2d 763 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 22, 34, 43, 45, 82.

C.J.S. — 30 C.J.S., Equity, § 47. 37 C.J.S., Fraud, § 28 et seq.

ALR. — Liability of publisher for mistake in advertisement, 10 A.L.R.2d 686.

Negligence in executing contract as affecting right to have it reformed, 81 A.L.R.2d 7.

23-2-33. Mere volunteers, in general; exception for executed contracts.

Equity will not interfere to relieve against accidents or mistakes of mere volunteers; but, if a contract is actually executed, all the rights growing out of it against or in favor of any one will be enforced.

History. — Orig. Code 1863, § 3049; Code 1868, § 3061; Code 1873, § 3116; Code 1882, § 3116; Civil Code 1895, § 3972; Civil Code 1910, § 4569; Code 1933, § 37-217.

JUDICIAL DECISIONS

Equity will not decree the reformation of an instrument at the instance of one who is a mere volunteer, and who was not a party to the instrument. Sylvan Property Mgt., Inc. v. Garner, 144 Ga. App. 747, 242 S.E.2d 292 (1978).

Voluntary rent provision and debt payment. — Defendant's claim that she satisfied her debt on a promissory note owed to her spouse by providing her mother-in-law with a rent-free apartment and by paying certain debts that spouse owed to certain creditors was to no avail as it was done under a mere volunteer arrangement with no outstanding obligations to do so. United States v. Speir, 808 F. Supp. 829 (S.D. Ga. 1992).

Cited in Smith v. Carter, 44 Ga. App. 438, 161 S.E. 649 (1931); Dobbs v. Perlman, 59 Ga. App. 770, 2 S.E.2d 109 (1939); Lifsey v. Mims, 193 Ga. 780, 20 S.E.2d 32 (1942); Glens Falls Indem. Co. v. Liberty Mut. Ins. Co., 202 Ga. App. 752, 44 S.E.2d 543 (1947); Sylvan Property Mgt., Inc. v. Garner, 144 Ga. App. 747, 242 S.E.2d 292 (1978).

23-2-34. Relief against original parties or privies; exception.

Equity will grant relief as between the original parties or their privies in law, in fact, or in estate, except bona fide purchasers for value without notice.

History. — Orig. Code 1863, § 3052; Code 1868, § 3064; Code 1873, § 3119; Code 1882, § 3119; Civil Code 1895, § 3976; Civil Code 1910, § 4573; Code 1933, § 37-213.

JUDICIAL DECISIONS

Analysis

General Consideration
Application of Section
1. Privies
Bona Fide Purchasers

General Consideration

This section is not limited by its terms to one remedy but applies to any equitable relief. Volunteer State Life Ins. Co. v. Powell-White Co., 187 Ga. 705, 1 S.E.2d 662 (1939).

Privity denotes successive relationship to the same right in the same property. Hilton v. Hilton, 202 Ga. 53, 41 S.E.2d 880 (1947).

The mere fact that plaintiff grantee and defendant grantee had entered into an agreement with the common grantor whereby each was to purchase separately from the common grantor one half of a described city lot, could not possibly constitute each grantee "an original party" to the deed of conveyance to the other within statute permitting reformation. Hilton v. Hilton, 202 Ga. 53, 41 S.E.2d 880 (1947).

It is an elementary principle of law that a privy, either in law, fact, or estate, has no greater right than the one with whom he is in privity, accordingly, since the plaintiff's father would have been estopped in law to attack and thus question the validity of the divorce which he procured from the plaintiff's mother, it logically follows that the plaintiff himself is also estopped to do so. Phillips v. Phillips, 211 Ga. 305, 85 S.E.2d 427 (1955).

Lack of standing in equity. — Decedent's estate administrator lacked standing to challenge the three assignments of the security deed in a non-judicial foreclosure sale because the administrator was not a party to the assignment contracts, and the administrator did not have standing in equity to seek relief because the administrator was not seeking reformation of the deed and did not allege mutual mistake. Shannon v. Albertelli Firm, P.C., No. 14-11832, 2015 U.S. App. LEXIS 7552 (11th Cir. May 7, 2015) (Unpublished).

Reformation of agreement was not permitted against bona fide purchaser of promissory note. — In a suit on a promissory note by a lender's assignee, although some evidence supported the borrowers' claim that terms in a Forbearance Agreement (FA) binding the guarantors were the product of mutual mistake and release of the guarantors was intended, the trial court erred in reforming the FA because the borrowers had not overcome the presumption that the assignee was a bona fide purchaser for value without notice of the mistake. Hamilton State Bank v. Kelly Capital Invs., LLC, 335 Ga. App. 252, 779 S.E.2d 757 (2015).

Cited in Harrison v. Hester, 160 Ga. 865, 129 S.E. 528 (1925); Sapp v. Ritch, 169 Ga. 33, 149 S.E. 636 (1929); McCollum v. Loveless, 187 Ga. 262, 200 S.E. 115 (1938); Thomas v. Lambert, 187 Ga. 616, 1 S.E.2d 443 (1939); Ayers v. Carden, 212 Ga. 510, 93 S.E.2d 694 (1956); Empire Land Co. v. Stokes, 212 Ga. 707, 95 S.E.2d 283 (1956); Lanier v. American Cas. Co., 226 F. Supp. 630 (N.D. Ga. 1964); DOT v. Brooks, 254 Ga. 303, 328 S.E.2d 705 (1985); Anderson v. Streck, 190 Ga. App. 224, 378 S.E.2d 526 (1989); Yeazel v. Burger King Corp., 241 Ga. App. 90, 526 S.E.2d 112 (1999).

Application of Section

1. Privies

Section extends equitable relief to privies to contract. — The general rule, which allows only the parties to a judgment to attack and thus question its validity, has been relaxed in this state by this section, however, the privity either in law, in fact, or in estate, which will permit one to attack and thus question the validity of a judgment to which he is not a party has no personal basis as a mere matter of sentiment, but rests upon some actual mutual or successive relationship as to the same right of property. Phillips v.

Application of Section (Cont'd)
1. Privies (Cont'd)

Phillips, 211 Ga. 305, 85 S.E.2d 427 (1955).

Section extends no rights to one not privy under original contract. — Primarily the right to reform a contract belongs to the original parties thereto. The recognized extension in favor of those in privity with the original contractors does not mean that the terms of a contract can be altered and reformed by one who does not claim as a successor under the contract sought to be reformed, but under another contract, setting up different and inconsistent rights. In such a case, the subsequent grantee's quarrel is with the person from whom he derived his title, rather than with the one holding adversely under a prior and different contract, to which he was admittedly neither party nor privy. Rawson v. Brosnan, 187 Ga. 624, 1 S.E.2d 423 (1939); Hilton v. Hilton, 202 Ga. 53, 41 S.E.2d 880 (1947).

In a quiet title action, the trial court properly granted summary judgment to the adjoining landowners as the suing neighbor was not entitled to reformation of corrective deeds entered into between the suing neighbor's predecessor in title and the adjoining landowners since the suing neighbor was not a party to the corrective deeds. Moore v. McBryar, 290 Ga. App. 725, 659 S.E.2d 789 (2008).

Requirement of privity of contract, etc., applies to remedy of reformation and to remedy of cancellation. — Where personal property is sold, and a bill of sale with warranty of title is executed by the vendor, and the property is again sold with warranty of title, the last vendee and his vendor may join in an equitable petition against the original vendor, having for its purpose the reformation of the original bill of sale by including certain items of property omitted therefrom by mutual mistake. Chapman v. Cassels Co., 180 Ga. 349, 179 S.E. 91 (1935).

When the absolute title to property is apparently in a vendor or mortgagor, the vendee or mortgagee is protected, unless the one seeking to set up a lien or trust against the property can show that the vendee or mortgagee had notice of trust funds having gone into the property. Tattnall Bank v. Harvey, 186 Ga. 752, 198 S.E. 724 (1938).

The mere fact that purchaser might have had some knowledge of a mingling by his vendor of trust funds with his own is not sufficient to charge the vendee with notice that trust funds had been diverted in the purchase of a particular piece of land. Tattnall Bank v. Harvey, 186 Ga. 752, 198 S.E. 724 (1938).

After the original vendor of the land died intestate, and there was no administrator or personal representative of the decedent at the time the suit was brought, a suit could be maintained against the sole heir at law of the intestate, as the heir was apparently the only party who was interested in resisting the suit. Steadham v. Cobb, 183 Ga. 30, 196 S.E. 730 (1938).

The rule requiring mutuality or privity of contract or estate, applies not only to the equitable remedy of reformation but to that of cancellation or other equitable relief against the effect of an instrument. Volunteer State Life Ins. Co. v. Powell-White Co., 187 Ga. 705, 1 S.E.2d 662 (1939).

Where the plaintiff in ejectment was the prior grantee of the tract sued for, not being a privy in law, fact, or estate with the defendant, who held under a subsequent deed from the common grantor, the defendant could not defend by reforming the plaintiff's deed so as to strike therefrom, as having been included by mutual mistake, the tract subsequently conveyed to the defendant. Volunteer State Life Ins. Co. v. Powell-White Co., 187 Ga. 705, 1 S.E.2d 662 (1939).

A petition in equity by a husband seeking to cancel two concurrent verdicts and a decree obtained in the same court in a former divorce suit by the wife against her former husband, and to have declared the continued existence of the former marriage, thereby establishing incapacity of the wife to marry at the time of her marriage to the plaintiff, was subject to a general demurrer (now motion to dismiss). Martocello v. Martocello, 197 Ga. 629, 30 S.E.2d 108 (1944).

Taking as true for purposes of a Chapter 7 trustee's motion for judgment on the pleadings a bank's contention that the

parties involved in the sale, financing, and purchase of the property at issue intended that the property be conveyed to the debtor wife alone and intended that the security deed encumber the entire property rather than only an undivided one-half interest, the bank was not entitled to reformation of a special warranty deed (SWD) under Georgia law because as a security deed grantee, it was not an original party to the SWD or in privity with any party to the SWD. Bank of Am., N.A. v. Adams (In re Adams), 583 B.R. 541 (Bankr. N.D. Ga. 2018).

Privy applied to Internal Revenue Service. — Internal Revenue Service, by reason of the fact that it was asserting a tax lien against property that inadvertently had been omitted from a conveyance deed, was a privy in law that was bound under Georgia law by a reformed conveyance because O.C.G.A. § 23-2-34 provided that equity will grant relief as between the original parties or their privies in law, in fact, or in estate, except bona fide purchasers for value without notice. Nat'l Assistance Bureau, Inc. v. Macon Mem'l Intermediate Care Home, Inc., No. 5:06-cv-301 (CAR), 2009 U.S. Dist. LEXIS 66362 (M.D. Ga. June 8, 2009).

Children who were remaindermen, and would receive whatever assets of a marital trust that their mother did not appoint or distribute by will, were privies in estate with their mother. Richardson v. Bridges, 260 Ga. 62, 389 S.E.2d 215 (1990).

Bona Fide Purchasers

Section protects interests of bona fide purchasers. — Where a husband contracts to buy land for value and directs conveyance thereof to his wife, no inference will arise that the wife is a purchaser for value, without notice of equities in favor of the vendor as against the vendee; and if the deed to the wife does not express the true agreement between the husband and the vendor, on account of mistake of the draftsman and mutual mistake of the vendor and the original vendee, the deed may be reformed so as to speak the true agreement. Cain v. Varnadore, 171 Ga. 497, 156 S.E. 216 (1930).

It is a rule in equity that a bona fide purchaser without notice, to be entitled to protection, must be so, not only at the time of the contract or conveyance, but until the purchase money is actually paid. Ross v. Rambo, 195 Ga. 100, 23 S.E.2d 687 (1942).

A partial payment of the purchase money before notice of the equitable title of the true owners, although not sufficient to invest the vendee with the character of a bona fide purchaser as regards the entire estate purchased, will entitle him to invoke the aid of the equitable principle that he who asks equity must do equity and to be reimbursed for the amount actually paid before. Ross v. Rambo, 195 Ga. 100, 23 S.E.2d 687 (1942).

When a husband fraudulently seeks and obtains a divorce from his wife in a court of his selection, he and his privies in law, in fact, or in estate, are thereafter conclusively estopped to assail the validity of the decree to the prejudice of innocent parties. Phillips v. Phillips, 211 Ga. 305, 85 S.E.2d 427 (1955).

Creditor could not prevail on the creditor's claim for equitable reformation of a security deed executed by a debtor that did not own the property because nothing in the chain of title provided constructive notice to a potential purchaser of the property of the creditor's equitable interest in the property. Stearns Bank, N.A. v. Rent-A-Tent, Inc. (In re Rent A Tent, Inc.), 468 B.R. 442 (Bankr. N.D. Ga. 2012).

While it is the rule that a bona fide purchaser of property in which trust funds have been invested is protected, the beneficiary of a trust estate may at his option, within a reasonable time, "affirm or reject an unauthorized investment by the trustee," and equity will aid the beneficiary in recovering the funds or property, or enforcing a lien for the wrongfully used funds, provided that the assets can be traced and remain in the hands of a person "affected with notice of the misapplication." Tattnall Bank v. Harvey, 186 Ga. 752, 198 S.E. 724 (1938).

Constructive and inquiry notice. — Purchasers of land are charged with constructive notice of recorded instruments and also recognizes the concept of inquiry notice. For a discussion of the balance

Bona Fide Purchasers (Cont'd)

between these concepts, see Stearns Bank, N.A. v. Rent-A-Tent, Inc. (In re Rent A Tent, Inc.), 468 B.R. 442 (Bankr. N.D. Ga. 2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 261.

C.J.S. — 31 C.J.S., Equity, § 133 et seq.

ALR. — Right of one who, with knowledge of outstanding equity, derived his interest in real property from or through a bona fide purchaser, to same protection as latter, 63 A.L.R. 1362.

Bona fides of purchaser of bill or note on an executory consideration, 100 A.L.R. 1357.

Right of lessee to equitable relief against forfeiture for breach of conditions as affected by lessor's giving a lease to or entering into other contractual obligations with a third person, 166 A.L.R. 807.

What constitutes notice to subsequent purchaser of real property of option to purchase contained in unrecorded lease, 17 A.L.R.2d 331.

Motor vehicle certificate of title or similar document as, in hands of one other than legal owner, indicia of ownership justifying reliance by subsequent purchaser or mortgagee without actual notice of other interests, 18 A.L.R.2d 813.

Rights as between purchaser of timber and subsequent vendee of land, 18 A.L.R.2d 1150.

Relative rights in real property as between purchasers from or through decedent's heirs or devisees and unknown surviving spouse, 39 A.L.R.2d 1082.

Extension of time or forbearance to sue as consideration constituting mortgagee bona fide purchaser, 39 A.L.R.2d 1088.

Knowledge or notice of inadequacy of consideration for conveyance in chain of title as affecting bona fide status of purchaser, 42 A.L.R.2d 1088.

Relative rights as between purchaser of chattel from one who had previously bought it with stolen money, and victim of the theft, 62 A.L.R.2d 537.

ARTICLE 3

FRAUD

Cross references. — Pleading requirements in actions involving fraud, § 9-11-9. Deceptive or unfair trade or business practices generally, § 10-1-370 et seq. Further provisions regarding fraud in contracts, §§ 13-4-60, 13-5-5. Fraudulent entries in elections, § 21-2-562 et seq. Equitable estoppel, § 24-14-29.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Fraudulent Misrepresentation as to Use to Which Real Property Could Be Put, 38 POF2d 91.

Fraudulent Representations Inducing the Purchase of a Small Business, 30 POF3d 1.

23-2-50. Concurrent jurisdiction over fraud.

In all cases of fraud, except fraud in the execution of a will, equity has concurrent jurisdiction with the law.

History. — Orig. Code 1863, § 3103; Code 1868, § 3115; Code 1873, § 3172; Code 1882, § 3172; Civil Code 1895, § 4024; Civil Code 1910, § 4621; Code 1933, § 37-701.

Cross references. — For further pro-

visions regarding actions for fraud, deceit, etc., see T. 51, C. 6.

JUDICIAL DECISIONS

Analysis

General Consideration
Equitable Jurisdiction Dependent on Adequacy of Legal Remedy
Pleading and Practice

General Consideration

History generally. — This section was derived from Trippe & Slade v. Ward, 2 Ga. 304 (1847) and DeLaperriere v. Williams, 167 Ga. 648, 146 S.E. 482 (1929).

In all cases of fraud equity has concurrent jurisdiction with the law, but the court first taking cognizance of the case will retain it. Jordan v. General Ins. Co. of Am., 92 Ga. App. 77, 88 S.E.2d 198 (1955).

Reluctance of equity to assume jurisdiction. — Though equity has concurrent jurisdiction with law in all cases of fraud except those in wills, unless some substantial equitable relief is sought, equity is reluctant to assume jurisdiction. Walsh v. Campbell, 130 Ga. App. 194, 202 S.E.2d 657 (1973).

Any misrepresentation intended to deceive and which does deceive is a fraud, for which a party is entitled to a remedy at law. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934).

Misrepresentation is one of the grounds on which equitable relief may be invoked in regard to judgments. Johnson v. Bogdis, 205 Ga. 535, 54 S.E.2d 620 (1949), later appeal, 207 Ga. 650, 63 S.E.2d 658 (1951).

One of the most frequently recurring forms of fraud on the part of one litigant against the other, entitling the latter to relief in equity against the judgment finally entered, is the making of some agreement or representation for the purpose of preventing an appearance or defense in the original action and reliance upon which has had the effect intended. Johnson v. Bogdis, 205 Ga. 535, 54 S.E.2d 620 (1949), later appeal, 207 Ga. 650, 63 S.E.2d 658 (1951).

Cited in Equitable Bldg. & Loan Ass'n v. Brady, 171 Ga. 576, 156 S.E. 222 (1930); Equitable Bldg. & Loan Ass'n v. Brady, 175 Ga. 43, 164 S.E. 674 (1932); Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934); Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937); Furr v. Jordan, 196 Ga. 862, 27 S.E.2d 861 (1943); Beavers v. Williams, 199 Ga. 114, 33 S.E.2d 343 (1945); Fulmer v. Wilkins, 201 Ga. 322, 39 S.E.2d 405 (1946); Heath v. Jones, 168 F.2d 460 (5th Cir. 1948); Clark v. White, 185 F.2d 528 (5th Cir. 1950); Rountree v. Davis, 90 Ga. App. 223, 82 S.E.2d 716 (1954); Oliver v. Farmer's State Bank, 224 Ga. 56, 159 S.E.2d 405 (1968); Sikes v. Sikes, 231 Ga. 105, 200 S.E.2d 259 (1973); Holder v. Brock, 129 Ga. App. 732, 200 S.E.2d 912 (1973); Central Soya Co. v. Bundrick, 234 Ga. 133, 214 S.E.2d 556 (1975).

Equitable Jurisdiction Dependent on Adequacy of Legal Remedy

Equitable jurisdiction in cases of fraud extended only where remedy at law is deficient. — This general principle does not authorize a suit in equity merely to recover damages for fraud, since the aggrieved party in such a case has an adequate and complete remedy at law. Aetna Ins. Co. v. Lunsford, 179 Ga. 716, 177 S.E. 727 (1934).

Petition seeking to rescind a conditional bill of sale because of alleged fraudulent representations of the vendor as to the kind, quality, and condition of the personalty sold, to recover the portion of the purchase money paid by the vendee, and for injunction, cancellation, and accounting, in which are set up no peculiar circumstances showing a necessity of interposition by a court of equity, such as insolvency or nonresidence of the vendor, is not maintainable in equity, as the plaintiff has an adequate and complete remedy

Equitable Jurisdiction Dependent on Adequacy of Legal Remedy (Cont'd)

at law, nor would the fact that it was alleged that the vendor was threatening to transfer the conditional sale contract to a third person afford any ground for equitable relief, under the facts. Williford v. Haverty Furn. Co., 183 Ga. 707, 189 S.E. 521 (1937).

When it appeared that insurance company had an adequate remedy at law in a suit filed by the insured against the company claiming disability payments under the policy, a petition in equity brought by the company to cancel the contract of insurance on the ground of fraud in its procurement was properly dismissed on demurrer (now motion to dismiss). Penn Mut. Life Ins. Co. v. Childs, 189 Ga. 835, 7 S.E.2d 907 (1940).

While it is true that in all cases of fraud equity has concurrent jurisdiction with the law, equity takes jurisdiction only where the operation of the general rules of law would be deficient in protecting the rights of the complaining party. Gandy v. Robinson Co., 216 Ga. 190, 115 S.E.2d 341 (1960).

Pleading and Practice

Judgments of probate courts may be set aside by equity, in a direct proceeding for that purpose, on the ground that they were procured by fraud. Johnson v. Bogdis, 205 Ga. 535, 54 S.E.2d 620 (1949), later appeal, 207 Ga. 650, 63 S.E.2d 658 (1951).

It has been many times held that judgments of courts of ordinary (now probate courts) may be set aside by equity, in a direct proceeding for that purpose, on the ground that they were procured by fraud. Maddox v. Wheeler, 230 Ga. 580, 198 S.E.2d 284 (1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 323 et seq.

C.J.S. — 30 C.J.S., Equity, § 48 et seq. 37 C.J.S., Fraud, § 74.

ALR. — Right of insurer to have issue of fraud, raised in action on the policy, tried in equity, 97 A.L.R. 572.

Reasonable expectation of payment as affecting offense under "worthless check" statutes, 9 A.L.R.3d 719.

23-2-51. Fraud as actual or constructive.

(a) Fraud may be actual or constructive.

(b) Actual fraud consists of any kind of artifice by which another is deceived. Constructive fraud consists of any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another.

(c) Actual fraud implies moral guilt; constructive fraud may be consistent with innocence.

History. — Orig. Code 1863, § 3104; Code 1868, § 3116; Code 1873, § 3173; Code 1882, § 3173; Civil Code 1895, § 4025; Civil Code 1910, § 4622; Code 1933, § 37-702.

Law reviews. — For case note, "Lynch v. Waters: Tolling Georgia's Statute of Limitations for Medical Malpractice," see 38 Mercer L. Rev. 1493 (1987).

JUDICIAL DECISIONS

Analysis

General Consideration
Fraud Generally
1. In General
2. Misrepresentation Generally
3. Actual Fraud
4. Constructive Fraud
5. Inceptive Fraud
Pleading and Practice

General Consideration

A statement of fact is the foundation of fraud. Daniel v. Dalton News Co., 48 Ga. App. 772, 173 S.E. 727 (1934).

Fraud is not always perpetrated by willful misrepresentations. Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 253 S.E.2d 82 (1979).

Actionable fraud cannot be based upon a promise as to future events; nor does actionable fraud arise from a mere failure to perform a promise. C.P.D. Chem. Co. v. National Car Rental Sys., 148 Ga. App. 756, 252 S.E.2d 665 (1979).

The general rule is that fraud cannot be predicated upon statements which are promissory in their nature as to future acts. FDIC v. Lattimore Land Corp., 656 F.2d 139 (5th Cir. 1981).

A promise, even a false promise, to perform an act in the future is not a false pretense or false representation, and does not constitute the basis for an action for fraud. FDIC v. Lattimore Land Corp., 656 F.2d 139 (5th Cir. 1981).

Cited in Mangham v. Cobb, 160 Ga. 182, 127 S.E. 408 (1925); Battle v. Williford, 160 Ga. 287, 127 S.E. 762 (1925); Lathrop v. Miller, 164 Ga. 167, 138 S.E. 50 (1927); Bryant v. Bush, 165 Ga. 252, 140 S.E. 366 (1927); Collins v. Collins, 165 Ga. 198, 140 S.E. 501 (1927); King Hdwe. Co. v. Ennis, 39 Ga. App. 355, 147 S.E. 119 (1929); Boyles v. Morgan, 168 Ga. 804, 149 S.E. 149 (1929); Thomas v. Couch, 171 Ga. 602, 156 S.E. 206 (1930); Equitable Bldg. & Loan Ass'n v. Brady, 175 Ga. 43, 164 S.E. 674 (1932); Morton v. Wallace, 177 Ga. 856, 171 S.E. 720 (1933); Dover v. Burns, 186 Ga. 19, 196 S.E. 785 (1938); Young v. Hirsch, 187 Ga. 1, 199 S.E. 179 (1938); Beavers v. Williams, 199 Ga. 114, 33 S.E.2d 343 (1945); McCommons v. Reid, 201 Ga. 500, 40 S.E.2d 73 (1946); Hogg v. Hogg, 206 Ga. 691, 58 S.E.2d 403 (1950); City of Dalton v. United States Fid. & Guar. Co., 216 Ga. 602, 118 S.E.2d 475 (1961); Bagley v. Firestone Tire & Rubber Co., 104 Ga. App. 736, 123 S.E.2d 179 (1961); Fuller v. Dillon, 220 Ga. 36, 136 S.E.2d 733 (1964); Tripp v. Conner, 220 Ga. 2, 136 S.E.2d 744 (1964); Bloodworth v. Bloodworth, 225 Ga. 379, 169 S.E.2d 150 (1969); Walsh v. Campbell, 130 Ga. App. 194, 202 S.E.2d 657 (1973); Hendrix v. Scarborough, 131 Ga. App. 342, 206 S.E.2d 42 (1974); Thibadeau Co. v. McMillan, 132 Ga. App. 842, 209 S.E.2d 236 (1974); Lewis v. Citizens & S. Nat'l Bank, 139 Ga. App. 855, 229 S.E.2d 765 (1976); Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244 (1980); Kessler v. Liberty Mut. Ins. Co., 157 Ga. App. 287, 277 S.E.2d 257 (1981); Duncan v. Poythress, 515 F. Supp. 327 (N.D. Ga. 1981); Goodlett v. Ray Label Corp., 171 Ga. App. 377, 319 S.E.2d 533 (1984); Palmer v. Neal, 602 F. Supp. 882 (N.D. Ga. 1984); Stanford v. Otto Niederer & Sons, 178 Ga. App. 56, 341 S.E.2d 892 (1986); Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986); Duracell, Inc. v. SW Consultants, Inc., 126 F.R.D. 571 (N.D. Ga. 1989); Holmes v. Drucker, 201 Ga. App. 687, 411 S.E.2d 728 (1991); O'Berry v. Cooper, 202 Ga. App. 97, 413 S.E.2d 736 (1991); McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992); Sears Mtg. Corp. v. Leeds Bldg. Prods., Inc., 219 Ga. App. 349, 464 S.E.2d 907 (1995); Garbutt v. Southern Clays, Inc., 894 F. Supp. 456 (M.D. Ga. 1995); Kodadek v. Lieberman, 247 Ga. App. 606, 545 S.E.2d 25 (2001); Wessinger v. Spivey

General Consideration (Cont'd)

(In re Galbreath), 475 B.R. 749 (Bankr. S.D. Ga. 2003).

Fraud Generally

1. In General

Fraud is either actual or constructive, and either constitutes legal fraud. Jordan v. Belvin, 57 Ga. 719, 196 S.E. 132 (1938); Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

Fraud may be actual or constructive; actual fraud consists in any kind of artifice by which another is deceived, and constructive fraud consists in any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another. Brittain Bros. Co. v. Davis, 174 Ga. 1, 161 S.E. 841 (1931).

Either actual or constructive fraud may consist in the misrepresentation of a material fact. Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

Fraud is exceedingly subtle in its nature and can be accomplished by infinite means; it may be perpetrated by signs and tricks, and even silence may in some instances amount to fraud. Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 253 S.E.2d 82 (1979).

Fraud cannot consist of mere broken promises, unfulfilled predictions, or erroneous conjectures as to future events. C.P.D. Chem. Co. v. National Car Rental Sys., 148 Ga. App. 756, 252 S.E.2d 665 (1979).

Constructive fraud, as well as actual fraud, voids the contract at the election of the injured party, and may authorize a rescission of a written release from liability. Southeastern Greyhound Lines v. Fisher, 72 Ga. App. 717, 34 S.E.2d 906 (1945).

While only actual fraud will authorize an ex parte rescission of a sale of personalty so as to enable the aggrieved party to sue at law, as in trover, for property that he may have delivered to the other under the contract, a sale either of realty or of personalty may be rescinded by a court for mere constructive fraud, where the other essentials of the case are established. Puckett v. Reese, 203 Ga. 716, 48 S.E.2d 297 (1948).

2. Misrepresentation Generally

Any misrepresentation intended to deceive and which does deceive is a fraud, for which a party is entitled to a remedy at law. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934); Thompson v. Wilkins, 143 Ga. App. 739, 240 S.E.2d 183 (1977).

In a suit by the seller for the purchase money of land, the defendant purchaser is entitled to plead that he was not put in possession of the premises and that the seller was guilty of false and fraudulent representations as to the existence of liens on the premises, and, upon proof of such facts, a verdict in his favor is authorized. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934).

When the owner of land represented to the purchaser that there was no encumbrance against the premises sold, thereby inducing him to purchase it, and it was found later to be encumbered, this constituted a fraudulent representation for which relief will be given the purchaser. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934).

A misrepresentation by a director to a person purchasing stock concerning the financial condition of the corporation is actionable. Daniel v. Dalton News Co., 48 Ga. App. 772, 173 S.E. 727 (1934).

To state that a certain individual had signed contract as surety and that her signature was genuine was a misrepresentation of material existing fact, a fraudulent thing in law which would avoid the contract. W.T. Rawleigh Co. v. Kelly, 78 Ga. App. 10, 50 S.E.2d 113 (1948).

Innocent misstatement may amount to negligence but is not fraud. Day v. Randolph, 159 Ga. App. 474, 283 S.E.2d 687 (1981).

In the absence of a confidential relationship a party may not rely and act on the misrepresentations of an opposite party as to the contents of a written instrument where the party signing can read and where no artifice or fraud is practiced which prevents the party

signing from reading the instrument. Robi v. Goldstein, 100 Ga. App. 606, 112 S.E.2d 165 (1959).

In the absence of special circumstances one must exercise ordinary diligence in making an independent verification of contractual terms and representations, failure to do which will bar an action based on fraud. Hubert v. Beale Roofing, Inc., 158 Ga. App. 145, 279 S.E.2d 336 (1981).

One cannot claim to be defrauded about a matter equally open to the observation of all parties where no special relation of trust or confidence exists. Hubert v. Beale Roofing, Inc., 158 Ga. App. 145, 279 S.E.2d 336 (1981).

Misrepresentations are not actionable unless the hearer was justified in relying on them in the exercise of common prudence and diligence. Daugert v. Holland Furnace Co., 107 Ga. App. 566, 130 S.E.2d 763 (1963).

Statements as to future acts merely promissory in their nature are not actionable. Boatman v. Citizens & S. Nat'l Bank, 155 Ga. App. 848, 273 S.E.2d 190 (1980).

A misrepresentation of a present state of mind is actionable as fraud. McFarland v. Kim, 156 Ga. App. 781, 275 S.E.2d 364 (1980).

If the plaintiffs represented to the defendant that they would sign a guarantee of defendant's obligations under the lease, knowing that they had no intention of ever doing this in the future, this would not be a broken promise as to a future act but would be a misrepresentation of a present state of mind and actionable as fraud. The failure of the plaintiffs to sign such a guarantee when presented to them by the landlord is some evidence that they had no intention at any time to complete that act. McFarland v. Kim, 156 Ga. App. 781, 275 S.E.2d 364 (1980).

Misrepresentations as to a question of law cannot constitute remediable fraud, because everyone is presumed to know the law and therefore cannot in legal contemplation be deceived by erroneous statements of law, and such representations are ordinarily regarded as mere expressions of opinion. Sorrells v. Atlanta Transit Sys., 218 Ga. 623, 129 S.E.2d 846 (1963).

Duty of party to protect self against fraud. — While a party must exercise reasonable diligence to protect himself against the fraud of another, he is not bound to exhaust all means at his command to ascertain the truth before relying upon the representations. Ordinarily the question whether the complaining party could have ascertained the falsity of the representations by proper diligence is for determination by the jury. Gaines v. Watts, 224 Ga. 321, 161 S.E.2d 830 (1968).

When the means of knowledge are at hand and equally available to both parties to a contract of sale, if the purchaser does not avail himself of these means, he will not be heard to say, in impeachment of the contract, that he was deceived by the representations of the seller. Lorick v. Na-Churs Plant Food Co., 150 Ga. App. 209, 257 S.E.2d 332 (1979).

3. Actual Fraud

Actual fraud predicated on intent. — Whether a fraud is actual depends on whether the false representation was made with the purpose and intent to deceive. Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

In any suit sounding in tort for damages on account of actual fraud, the gist of the action is the purpose and design to deceive. Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

Actual fraud involves moral guilt, since there must be an intentional purpose to deceive. Turner v. Ware, 2 Ga. App. 57, 58 S.E. 310 (1907); Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

A material misrepresentation constituting actual fraud may give rise to an independent action in tort for deceit, to recover for damage thus occasioned. In such a suit it is necessary to show, not only that a material misrepresentation was made for the purpose of inducing the plaintiff to act, that he had a right to act, and that he did act thereon to his injury, but it must be shown that such representation was willfully and knowingly false, or what the law regards as the equivalent of knowledge, a reckless or fraudulent representation about that which the party pretends to know, but

Fraud Generally (Cont'd)
3. Actual Fraud (Cont'd)

about which he knows that he does not know, and by which false pretense his purpose and intent is to deceive. Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

Essential elements. — A promise to take title to the property, farm it, pay off the debt existing thereon, and then to reconvey it to the plaintiff, made as an inducement or consideration for the execution of a deed by plaintiff, does not constitute fraud, so as to authorize cancellation of the deed, or a decree of specific performance of the agreement to convey, unless the promise was made with the present intention not to comply with it. A mere failure to comply with the promise would be insufficient to establish such fraudulent intent. Dixon v. Dixon, 211 Ga. 557, 87 S.E.2d 369 (1955).

To allege fraud, the claimant must contend the defendant knowingly made a false representation with the intent and purpose of deceiving the plaintiff. Additionally, there must be a reliance on such representations and a loss sustained thereby. The misrepresentations must also relate to a preexisting or present fact and not statements or representations involving future conduct. Cone Mills Corp. v. A.G. Estes, Inc., 377 F. Supp. 222 (N.D. Ga. 1974).

In an independent affirmative action for fraud and deceit, which must be predicated upon actual fraud, the plaintiff must allege and prove the following essential ingredients: (1) the defendant made the representations; (2) at the time he knew they were false (or what the law regards as the equivalent of knowledge, a fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive); (3) the defendant made the representations with the intention and purpose of deceiving the plaintiff; (4) the plaintiff relied upon such representations; (5) the plaintiff sustained the alleged loss and damage as the proximate result of their having been made; and (6) (an element frequently omitted in the cases enumerating the essentials), want of knowledge by the party alleged to have been deceived that the representation was false. It is essential that the plaintiff was deceived and there can be no deceit if the plaintiff knows that the representations upon which he is alleged to have acted were false. Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959); Romedy v. Willett Lincoln-Mercury, Inc., 136 Ga. App. 67, 220 S.E.2d 74 (1975); C.P.D. Chem. Co. v. National Car Rental Sys., 148 Ga. App. 756, 252 S.E.2d 665 (1979).

The five elements of fraud and deceit in Georgia are: (1) false representation made by the defendant; (2) scienter; (3) an intention to induce the plaintiff to act or refrain from acting in reliance by the plaintiff; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981).

The five elements necessary to be shown in an action for fraud are that the misrepresentation or falsehood was knowingly made, that it related to a material fact, that its purpose was to deceive another and induce him to act, that he did act upon it and that he was injured as a result. Day v. Randolph, 159 Ga. App. 474, 283 S.E.2d 687 (1981).

Actual fraud is not essential to support an action in equity to rescind a contract for fraud, or to a plea of fraud to a suit on a contract; innocently made material misrepresentations which the opposite party has a right to act on, and does act on to his injury, and which amount only to constructive fraud, being sufficient in these last two instances. By a parity of reasoning, actual fraud is not essential to the setting aside of an accord and satisfaction. Jordan v. Belvin, 57 Ga. 719, 196 S.E. 132 (1938).

An independent action in tort for deceit must be grounded on actual fraud. Plough Broadcasting Co. v. Dobbs, 163 Ga. App. 264, 293 S.E.2d 526 (1982).

A theft offense constitutes actual moral fraud, and the trial court did not err in failing to charge the differences between the two types of fraud where defendant admitted theft. Alford v. Oliver, 169 Ga. App. 865, 315 S.E.2d 299 (1984).

Invoice practices constituted evidence

from which a jury might have concluded that a contractor engaged in covert dealings with employee, and the employee's alleged destruction of business records might have been considered evidence of fraud under O.C.G.A. § 23-2-51. GIW Indus. v. JerPeg Contr., Inc., 530 F. Supp. 2d 1323 (S.D. Ga. 2008).

4. Constructive Fraud

If a person having legal title to land, which fact he does not know but has convenient means of knowing, and after a lapse of 27 years, during which time he was under no legal disability, he still has not learned the fact of his interest in the land, and in those circumstances he induces one to buy the land from a third person by representations that the land is the property of such third person, his misrepresentations to the purchaser innocently made, coupled with his delay in ascertaining the truth, will amount to constructive fraud, and they may be pleaded as an estoppel by the purchaser on the faith of the title of his vendor. Lanier v. Bryant, 180 Ga. 409, 179 S.E. 346 (1935).

Constructive fraud does not involve moral guilt, since it is the act itself, as taken in connection with the relationship of the parties, and not the guilty purpose or intent, which constitutes constructive fraud. Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

When insured furnished false evidence which was relied upon by the insurance company in reinstating insurance policies the insured was guilty of fraud in law which would avoid the policy, whether the insured was in good or bad faith and whether the insured intended to deceive or not. New York Life Ins. Co. v. Odom, 93 F.2d 641 (5th Cir. 1937), cert. denied, 304 U.S. 566, 58 S. Ct. 948, 82 L. Ed. 1532 (1938).

When insured, in applying for reinstatement of life policies, furnishes false evidence which is relied on by the insurance company, one is guilty of fraud in law which avoids the policy whether one acts in good or bad faith and whether one intends to deceive or not. Life & Cas. Ins. Co. v. Davis, 62 Ga. App. 832, 10 S.E.2d 129 (1940).

Innocent misrepresentations, when made by one charged with a special duty to the opposite party to know and to impart the truth, under the statutes and decisions of this state cannot amount to anything more than constructive fraud, and, as such, are not creative of any independent right of action for damages in tort in favor of the injured party; but they may support an action in equity to rescind a contract so induced or be pleaded in defense to a suit on a contract thus procured, or may, it might seem, under the doctrine of estoppel, be employed in support of an action founded on the contract itself. Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

Constructive fraud may arise out of any act of omission or commission, contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience and operates to the injury of another; constructive fraud may moreover be consistent with innocence and not smacking with moral guilt. Graham v. Hogan, 185 Ga. App. 842, 366 S.E.2d 219 (1988).

"Contrary to good conscience" requirement. — Where there is no evidence of suppression, misrepresentation or concealment or bad faith so as to impute moral guilt, the mere omission of a matter from a document coupled with the failure to reveal the omission can hardly be even constructive fraud unless it is "contrary to good conscience." Rhodes v. Perimeter Properties, Inc., 187 Ga. App. 55, 369 S.E.2d 332 (1988).

Knowledge not required. — Constructive fraud is legal fraud, but does not require knowledge or scienter. Macon-Bibb County Hosp. Auth. v. Georgia Kaolin Co., 646 F. Supp. 90 (M.D. Ga. 1986), aff'd, 817 F.2d 98 (11th Cir. 1987).

Evidence of constructive fraud. — When claimant was seeking workers' compensation benefits from the employer based on her alleged total disability and inability to work but at the same time she took this position before the Workers' Compensation Board, she was gainfully employed by a different employer, this is evidence sufficient to support the superior court's finding of constructive fraud. Dennington v. Rockdale Package Stores,

Fraud Generally (Cont'd)
4. Constructive Fraud (Cont'd)

Inc., 161 Ga. App. 450, 288 S.E.2d 709 (1982).

Nondisclosure. — Nondisclosure may provide the basis for constructive fraud where a party is under an obligation to communicate. First Union Nat'l Bank v. Davies-Elliot, Inc., 207 Ga. App. 791, 429 S.E.2d 161 (1993).

Even though a bank had a duty to notify its customer of a change in its signature verification procedures, where there was no evidence that the bank refrained from informing its customers in order to induce them to take or refrain from taking any certain action, there was no showing of constructive fraud. Eason Publications, Inc. v. Nationsbank, 217 Ga. App. 726, 458 S.E.2d 899 (1995).

False identities. — Trial court properly granted summary judgment to the auto dealer, mortgage broker, and the lender on the accused person's contention that they committed constructive fraud by approving and acting upon the credit application filled out by another person who used the accused person's name to obtain the financing necessary to purchase a truck. Constructive fraud is an equitable doctrine that would not support the accused person's request for damages under these circumstances, especially since the evidence did not show they knew or should have known of the impropriety surrounding the transaction. Blakey v. Victory Equip. Sales, Inc., 259 Ga. App. 34, 576 S.E.2d 38 (2002).

Confidential relationships. — Executor's claim that a brother and a wife committed constructive fraud by withdrawing money from a decedent's bank account while the decedent was living with them prior to the decedent's death was dismissed on summary judgment; even if a confidential relationship existed between the decedent and the brother and the wife, the executor could not seek money damages on a claim brought under O.C.G.A. § 23-2-51(b). Rowland v. Rowland, No. 1:04-CV-2068-TWT, 2005 U.S. Dist. LEXIS 30296 (N.D. Ga. Nov. 16, 2005).

Constructive fraud not found. — Superior court did not err in failing to vacate an order allowing an employee to change an authorized treating physician, as the employer failed to show that due to the employee's misleading service and the Board's loss of its pleadings, it was the victim of constructive fraud which amounted to the deprivation of due process; while the employer should have been served with the evidence presented to the administrative law judge, and the Board should have properly handled the employee's filings, the employer could not show that it suffered any harm or injury. MARTA v. Reid, 282 Ga. App. 877, 640 S.E.2d 300 (2006).

No fraud shown on part of developer. — In an action brought by the purchasers of a lot seeking to cancel the developer's security deed based upon alleged fraud, the trial court properly granted summary judgment to the developer as, even if the developer knew of the sale of the lot to the purchasers, such sale did not estop the developer from the developer's claim against the lot pursuant to the developer's security deed; however, the trial court did err by denying the equitable subrogation claim asserted by the purchasers' lender since exercising subrogation did not prejudice the developer in any manner. Byers v. McGuire Props., 285 Ga. 530, 679 S.E.2d 1 (2009), overruled on other grounds by SRM Group, Inc. v. Travelers Prop. Cas. Co. of Am., 2020 Ga. LEXIS 235 (Ga. 2020).

5. Inceptive Fraud

When the failure to perform the promised act is coupled with the present intention not to perform, fraud in the legal sense is present; this is known as inceptive fraud, and is sufficient to support an action for cancellation of a written instrument. Cone Mills Corp. v. A.G. Estes, Inc., 377 F. Supp. 222 (N.D. Ga. 1974).

Pleading and Practice

It is error to charge the jury concerning fraud when no harm was done the defendant nor was the defendant deceived or injured in any way as the result of the plaintiff attempting to write in an endorsement on a note which had

actually been transferred to it but had not been properly endorsed. Associates Disct. Corp. v. Brantley, 102 Ga. App. 751, 117 S.E.2d 916 (1960).

Diligence is question for jury. — It is the province of the jury to pass upon all the circumstances of the alleged fraud, and to determine whether or not the party defrauded exercised diligence in discovering the falsity of the misrepresentations. Daniel v. Dalton News Co., 48 Ga. App. 772, 173 S.E. 727 (1934); Daugert v. Holland Furnace Co., 107 Ga. App. 566, 130 S.E.2d 763 (1963).

The purchase by an administrator at one's own sale is not in itself fraud. Gormley v. Askew, 177 Ga. 554, 170 S.E. 674 (1933).

Fraud and undue influence can rarely be established by direct proof, accordingly, both may be proved by indirect evidence and by proof of facts from which they may be inferred. Daniel v. Etheredge, 198 Ga. 191, 31 S.E.2d 181 (1944).

Fraud and undue influence are not equivalent terms, but undue influence may be a species of fraud or it may exist without any positive fraud. Daniel v. Etheredge, 198 Ga. 191, 31 S.E.2d 181 (1944).

In order to give rise to an action for damages, the defendant's fraud must be actual, i.e., the misrepresentation must be made either knowingly or with reckless disregard for the consequences. Irvin v. Lowe's of Gainesville, Inc., 165 Ga. App. 828, 302 S.E.2d 734 (1983).

"Innocent" or "constructive" fraud exists only as an equitable doctrine and will not support an action in tort for damages. Irvin v. Lowe's of Gainesville, Inc., 165 Ga. App. 828, 302 S.E.2d 734 (1983).

Fraud may be proved by showing a present intent to dishonor the promise to undertake a future act or present knowledge of the impossibility of an opinion. FDIC v. Lattimore Land Corp., 656 F.2d 139 (5th Cir. 1981).

Instructions. — It was error for court to charge jury on actual and constructive fraud in language of O.C.G.A. §§ 23-2-51 and 23-2-57, but to neglect to charge on essential elements of actual fraud. Plough Broadcasting Co. v. Dobbs, 163 Ga. App. 264, 293 S.E.2d 526 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 4.

C.J.S. — 30 C.J.S., Equity, § 48 et seq. 37 C.J.S., Fraud, § 2.

ALR. — Remedy of contractor, who has partially performed before discovering fraud, as to character or amount of work, 2 A.L.R. 1396.

Presence of noxious weeds as ground for rescission of contract for purchase of land, 2 A.L.R. 1511.

Misrepresentation as regards validity of conveyance or transfer of property as fraud, 9 A.L.R. 1051.

False representations in business transaction as within statute relating to "confidence game", 9 A.L.R. 1527; 56 A.L.R. 727.

Fraud or perjury in misrepresenting status or relationship essential to the judgment as ground of relief from, or injunction against, judgment, 49 A.L.R. 1219.

May offense of obtaining money or property by false pretenses or confidence game be predicated on obtaining loan or renewal thereof, 52 A.L.R. 1167.

Misrepresentation or mistake as to whether corporate stock is assessable as one of law or of fact, 65 A.L.R. 1256.

Examination of real property by purchaser before entering into contract as precluding rescission on ground of falsity of representations, 70 A.L.R. 942.

Misrepresentation as to market price or market value as fraud, 71 A.L.R. 622.

Fraud: necessity for knowledge of falsity of representation as to value, inducing subscription to or purchase of corporate stock, or other securities, 73 A.L.R. 1120.

Civil liability of bank officer or director permitting deposit after insolvency of bank, 87 A.L.R. 1402.

Promises and statements as to future events as fraud, 91 A.L.R. 1295; 125 A.L.R. 879.

Application of principal that false representations made to one person with intention that another may act thereon are actionable in favor of latter, 91 A.L.R. 1363.

Illegal or fraudulent intent of prosecuting witness or person defrauded as defense in prosecution based on false representations, 95 A.L.R. 1249; 128 A.L.R. 1520.

Financial statement by borrower as basis of loan or extension of credit, 104 A.L.R. 921.

Action for fraud or deceit predicated upon oral contract within the statute of frauds or the transaction of which the oral contract was a part, 104 A.L.R. 1420.

Concealment of fact that one of parties to land contract was acting for third person, or misrepresentation as to identity of party for whom he was acting as reason for denying specific performance, or for rescission of contract, 121 A.L.R. 1162.

Fraud predicated upon misrepresentation by grantee or transferee regarding grantor's or transferrer's title, 136 A.L.R. 1299.

What amounts to fraud on contractor, sustaining rescission or action for damages under building or construction contract, 166 A.L.R. 938.

Doctrine of constructive trust or unjust enrichment as applicable between owner and one who fraudulently procures tax certificates, 175 A.L.R. 700.

Real estate broker's right to commission where purchaser refuses to go through with executory contract because of reckless misrepresentation made to him by broker respecting property, 9 A.L.R.2d 504.

Misrepresentation as to loan commitment on real estate as ground of action, counterclaim, or rescission by vendee, 14 A.L.R.2d 1347.

Misrepresentation by one other than insurance agent as to coverage, exclusion, or legal effect of insurance policy, as actionable, 29 A.L.R.2d 213.

Misrepresentation by lessor, in negotiations for lease, as to offers of rental received from third persons, as actionable fraud, 30 A.L.R.2d 923.

Liability of vendor of structure for failure to disclose that it was built on filled ground, 80 A.L.R.2d 1453.

Reasonable expectation of payment as affecting offense under "worthless check" statutes, 9 A.L.R.3d 719.

Employer's misrepresentations as to employee's or agent's future earnings as actionable fraud, 16 A.L.R.3d 1311.

Application of "bad check" statute with respect to postdated checks, 52 A.L.R.3d 464.

Consumer class actions based on fraud or misrepresentation, 53 A.L.R.3d 534.

Promissory estoppel as basis for avoidance of statute of frauds, 56 A.L.R.3d 1037.

Automobile or motorcycle as necessary for infant, 56 A.L.R.3d 1335.

Automobile insurance: concealment or nondisclosure of physical defects or conditions as avoiding coverage, 72 A.L.R.3d 804.

Spouse's acceptance or retention of benefits of other spouse's fraudulent act as ratification of transaction, 82 A.L.R.3d 625.

Fraud predicated on vendor's misrepresentation or concealment of danger or possibility of flooding or other unfavorable water conditions, 90 A.L.R.3d 568.

Action based upon reconveyance, upon promise of reconciliation, of property realized from divorce award or settlement, 99 A.L.R.3d 1248.

Modern status of rules to avoidance of release of personal injury claim on ground of mistake as to nature and extent of injuries, 13 A.L.R.4th 686.

Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act, 19 A.L.R.4th 959.

23-2-52. Misrepresentation as legal fraud.

Misrepresentation of a material fact, made willfully to deceive or recklessly without knowledge and acted on by the opposite party or

made innocently and mistakenly and acted on by the opposite party, constitutes legal fraud.

History. — Orig. Code 1863, § 3105; Code 1868, § 3117; Code 1873, § 3174; Code 1882, § 3174; Civil Code 1895, § 4026; Civil Code 1910, § 4623; Code 1933, § 37-703.

Law reviews. — For article, "Consumer Protection Against Sellers Misrepresentations," see 20 Mercer L. Rev. 414 (1969).

JUDICIAL DECISIONS

Analysis

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General Consideration

Fraud is either actual or constructive, and either constitutes legal fraud. Jordan v. Belvin, 57 Ga. 719, 196 S.E. 132 (1938); Southeastern Greyhound Lines v. Fisher, 72 Ga. App. 717, 34 S.E.2d 906 (1945).

Legal fraud in concealment of corporate status. — Concealment by defendant of the financial status of the corporation when it was in fact a losing business facing lawsuits coupled with delivery of nonvoting stock instead of the promised voting stock constituted legal fraud when it was proven to the satisfaction of the jury. Adkins v. Lee, 127 Ga. App. 261, 193 S.E.2d 252 (1972).

Constructive fraud. — Misrepresentation of a material fact, if made by mistake, and innocently, and acted on by the opposite party to one's injury, constitutes constructive fraud. Southeastern Greyhound Lines v. Fisher, 72 Ga. App. 717, 34 S.E.2d 906 (1945).

Material misrepresentations in insurance applications. — In the case of fire and life insurance applications a misrepresentation is material if the misrepresentation changes the character, nature or extent of the risk. State Farm Mut. Ins. Co. v. Anderson, 107 Ga. App. 348, 130 S.E.2d 144, cert. dismissed, 219 Ga. 211, 132 S.E.2d 556 (1963).

When it is shown that a material statement in an application is false which was known to the insured at the time the insured made it and it was made with a view toward obtaining the insurance, with the company having no knowledge of its falsity, when the company acted upon it to its injury, the law will conclusively presume an intent to deceive, and a case of actual fraud will be made out. State Farm Mut. Auto. Ins. Co. v. Anderson, 107 Ga. App. 348, 130 S.E.2d 144, cert. dismissed, 219 Ga. 211, 132 S.E.2d 556 (1963).

Any misrepresentation intended to deceive and which does deceive is a fraud, for which a party is entitled to a remedy at law. Adkins v. Lee, 127 Ga. App. 261, 193 S.E.2d 252 (1972).

In order for a fraud to be actionable, the representation relied on must be more than a promise which is void or unenforceable. Barrett v. Independent Order of Foresters, 625 F.2d 73 (5th Cir. 1980).

Statements as to the nature of insurance coverage are opinions of law and cannot be the basis of a cause of action for fraud. Macon-Bibb County Hosp. Auth. v. Georgia Kaolin Co., 646 F. Supp. 90 (M.D. Ga. 1986), aff'd, 817 F.2d 98 (11th Cir. 1987).

Knowledge of seller that product unavailable. — Salesman fraudulently induced customers to execute a sales contract by representing that "blue sculpted"

General Consideration (Cont'd)

carpet was available when he knew it was not or recklessly asserted the fact with intent to deceive. Country Pride Homes, Inc. v. DuBois, 201 Ga. App. 740, 412 S.E.2d 282 (1991).

Civil fraud and theft by deception have different elements and showing that there are jury issues as to fraud does not necessarily show that there are jury issues as to theft by deception; a failure to show the level of intent needed for proving theft by deception would preclude a jury issue on that crime as a predicate act for RICO purposes, defeating a RICO claim. Avery v. Chrysler Motors Corp., 214 Ga. App. 602, 448 S.E.2d 737 (1994).

Cited in Hixon v. Hinkle, 156 Ga. 341, 118 S.E. 874 (1923); Mangham v. Cobb, 160 Ga. 182, 127 S.E. 408 (1925); Nix v. Citizens Bank, 35 Ga. App. 55, 132 S.E. 249 (1926); Penn Mut. Life Ins. Co. v. Taggart, 38 Ga. App. 509, 144 S.E. 400 (1928); Hamlin v. Johns, 166 Ga. 880, 144 S.E. 659 (1928); Lancaster v. Neal, 41 Ga. App. 721, 154 S.E. 386 (1930); Equitable Bldg. & Loan Ass'n v. Brady, 175 Ga. 43, 164 S.E. 674 (1932); Wall v. Wall, 176 Ga. 757, 168 S.E. 893 (1933); Roper v. White, 178 Ga. 293, 173 S.E. 115 (1934); Dover v. Burns, 186 Ga. 19, 196 S.E. 785 (1938); Crowell v. Brim, 191 Ga. 288, 12 S.E.2d 585 (1940); Norwood v. Norwood, 207 Ga. 148, 60 S.E.2d 449 (1950); Patterson v. Correll, 92 Ga. App. 214, 88 S.E.2d 327 (1955); Sorrells v. Atlanta Transit Sys., 218 Ga. 623, 129 S.E.2d 846 (1963); Walsh v. Campbell, 130 Ga. App. 194, 202 S.E.2d 657 (1973); Thibadeau Co. v. McMillan, 132 Ga. App. 842, 209 S.E.2d 236 (1974); City of Jesup v. Spivey, 133 Ga. App. 403, 210 S.E.2d 859 (1974); Clements v. Warner Robins Supply Co., 235 Ga. 612, 221 S.E.2d 35 (1975); North Peachtree I-285 Properties, Ltd. v. Hicks, 136 Ga. App. 426, 221 S.E.2d 607 (1975); McClure v. Thomas Cook, Inc., 158 Ga. App. 467, 280 S.E.2d 876 (1981); Everson v. Franklin Disct. Co., 248 Ga. 811, 285 S.E.2d 530 (1982); Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E.2d 533 (1982); Rhodes v. Perimeter Properties, Inc., 187 Ga. App. 55, 369 S.E.2d 332 (1988); O'Brien v. Union Oil Co., 699 F. Supp. 1562 (N.D. Ga. 1988); Johnson Realty, Inc. v. Hand, 189 Ga. App. 706, 377 S.E.2d 176 (1988); Vickers v. Roadway Express, Inc., 210 Ga. App. 78, 435 S.E.2d 253 (1993); In re Dukes, 213 Bankr. 202 (Bankr. S.D. Ga. 1997); Sellers Bros., Inc. v. Imperial Flowers, Inc., 232 Ga. App. 687, 503 S.E.2d 573 (1998); GE Life & Annuity Assur. Co. v. Donaldson, 189 F. Supp. 2d 1348 (M.D. Ga. 2002); GE Life & Annuity Assur. Co. v. Barbour, 189 F. Supp. 2d 1360 (M.D. Ga. 2002); McBride v. Life Ins. Co., 190 F. Supp. 2d 1366 (M.D. Ga. 2002); GE Life & Annuity Assur. Co. v. Barbour, 191 F. Supp. 2d 1375 (M.D. Ga. 2002); GE Life & Annuity Assur. Co. v. Combs, 191 F. Supp. 2d 1364 (M.D. Ga. 2002); J'Carpc, LLC v. Wilkins, 545 F. Supp. 2d 1330 (N.D. Ga. 2008).

Remedies

1. In General

Election of remedies. — When a vendee is induced to enter into a contract for the purchase of land by the fraud of the vendor, when the former discovers the fraud he has an election of remedies. One of such remedies is to rescind the contract, and another is to affirm the contract and sue for damages for the fraud. Price v. Mitchell, 154 Ga. App. 523, 268 S.E.2d 743 (1980).

2. Rescission

Rescission of transaction based on misrepresentation authorized. — Material misrepresentation, made for the purpose of inducing another to execute a promissory note, will authorize the maker, after executing the note, to rescind the transaction on discovery of the fraud, if the maker relied upon the representation and was induced thereby to execute the note. Thompson v. Wilkins, 143 Ga. App. 739, 240 S.E.2d 183 (1977).

A promise to do a certain thing for the benefit of the promisee, made to induce his entrance into a contract, the promisee earnestly believing that he would receive the benefits consequent upon the fulfillment of the promise, when at the time of making the promise there was no intention on the part of the promisor to fulfill it,

but, on the contrary, the promise was made with intent not to fulfill it and was uttered as a mere scheme or device to defraud, is such a fraud as will void any contract induced thereby. A promise thus fraudulently made will authorize rescission of a written instrument purporting to be a contract. Price v. Mitchell, 154 Ga. App. 523, 268 S.E.2d 743 (1980).

Constructive fraud, as well as actual fraud, voids the contract at the election of the injured party, and may authorize a rescission of a written release from liability. Southeastern Greyhound Lines v. Fisher, 72 Ga. App. 717, 34 S.E.2d 906 (1945).

A material representation falsely made by a vendor to a vendee to induce a sale, and made with knowledge of its falsity and acted upon to the vendee's injury, amounts to actual fraud, and will void a contract, and authorize rescission by the vendee if he acts promptly after discovery of the fraud and restores or offers to restore whatever of value he has received by virtue of the contract. Price v. Mitchell, 154 Ga. App. 523, 268 S.E.2d 743 (1980).

3. Damages

Damages generally. — Misrepresentation of a material fact, made by one of the parties to a contract, though made by mistake, and innocently, if acted on by the opposite party, constitutes legal fraud, and the party injured in consequence thereof may set up the damages thus arising in defense to an action upon the contract. Morton v. W.T. Tharpe & Co., 41 Ga. App. 788, 154 S.E. 716 (1930).

When a vendor agrees to sell a designated tract of land to another and points out to the latter its boundaries and if such boundaries include lands to which the vendor has no title, in consequence of which the purchaser loses the land, the purchaser can setoff at law the value of the portion of the land so lost, against the purchase money whether the representations were designedly made by the vendor to deceive the purchaser, or were innocently made. Bonner v. Cotton, 223 Ga. 843, 159 S.E.2d 61 (1968).

When there is a material misrepresentation, a policy (of insurance) may be voided. State Farm Mut. Ins. Co. v. Anderson, 107 Ga. App. 348, 130 S.E.2d 144, cert. dismissed, 219 Ga. 211, 132 S.E.2d 556 (1963).

Voiding insurance policy when guilty of fraud. — When insured furnished false evidence which was relied upon by the insurance company in reinstating insurance policies the insured was guilty of fraud in law which would void the policy, whether the insured was in good or bad faith and whether the insured intended to deceive or not. New York Life Ins. Co. v. Odom, 93 F.2d 641 (5th Cir. 1937), cert. denied, 304 U.S. 566, 58 S. Ct. 948, 82 L. Ed. 1532 (1938).

Ordinary Diligence

Ordinary diligence required of party claiming injury. — An equitable action to cancel a deed on the ground of fraud, which clearly shows that the complainant failed to use even slight diligence to discover the fraud, fails to allege a cause of action. Courts of equity will not grant relief to one whose long delay renders the ascertainment of the truth difficult, though no legal limitation bars the action. Whitfield v. Whitfield, 204 Ga. 64, 48 S.E.2d 852 (1948).

While the doctrine of caveat emptor would charge the purchaser with looking out for the title which the seller had to the tract offered for sale as his, it would not charge him with looking out for the boundaries of that tract when the seller undertook to locate and point them out, thus professing to know them sufficiently to enable them to furnish this information to purchasers instead of leaving the latter to their own resources in acquiring the information. Bonner v. Cotton, 223 Ga. 843, 159 S.E.2d 61 (1968).

Blind reliance exists where it cannot be said that the purchase originated in fraud so much as in the carelessness of the purchaser to exercise ordinary care for his own interest. Adkins v. Lee, 127 Ga. App. 261, 193 S.E.2d 252 (1972).

One cannot claim to be defrauded by the false representation of another when, by the exercise of ordinary diligence, such person could have discovered the falsity of the representations before acting thereon. Barrett v. Independent Order of Foresters, 625 F.2d 73 (5th Cir. 1980).

Ordinary Diligence (Cont'd)

Failure to open trunk of car represented as new. — It cannot be said as a matter of law that failure of plaintiff to open trunk of car represented as new in order to inspect for damage, either at time of purchase or within three and a half months thereafter amounted to failure of due diligence. Horne v. Claude Ray Ford Sales, Inc., 162 Ga. App. 329, 290 S.E.2d 497 (1982).

Pleading and Practice

In order to give rise to an action for damages, the defendant's fraud must be actual, i.e., the misrepresentation must be made either knowingly or with reckless disregard for the consequences. Irvin v. Lowe's of Gainesville, Inc., 165 Ga. App. 828, 302 S.E.2d 734 (1983).

"Innocent" or "constructive" fraud exists only as an equitable doctrine and will not support an action in tort for damages. Irvin v. Lowe's of Gainesville, Inc., 165 Ga. App. 828, 302 S.E.2d 734 (1983).

Questions of fraud, bad faith and materiality of misrepresentation are ordinarily for a jury. Adkins v. Lee, 127 Ga. App. 261, 193 S.E.2d 252 (1972).

A contention that fraud is a personal defense or plea, and could be made only by the party deceived, is without merit. Houston v. Horton, 202 Ga. 307, 43 S.E.2d 90 (1947).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 247 et seq.

Am. Jur. Proof of Facts. — Conveyance with Intent to Defraud Creditors, 5 POF2d 697.

False Representation as to Quality or Character of Product, 35 POF2d 255.

C.J.S. — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, §§ 3, 19 et seq.

ALR. — Misrepresentation as regards validity of conveyance or transfer of property as fraud, 9 A.L.R. 1051.

False representations in business transaction as within statute relating to "confidence game", 9 A.L.R. 1527; 56 A.L.R. 727.

Seller's concealment of ownership of other property inducing exclusion of same from contract as actionable fraud, 26 A.L.R. 990.

Promises and statements as to future events as fraud, 51 A.L.R. 46; 68 A.L.R. 635; 91 A.L.R. 1296; 125 A.L.R. 879.

Misrepresentation as to market price or market value as fraud, 71 A.L.R. 622.

Employer's misrepresentations as to employee's or agent's future earnings as actionable fraud, 16 A.L.R.3d 1311.

Duty of vendor of real estate to give purchaser information as to termite infestation, 22 A.L.R.3d 972.

Purchaser's misrepresentations as to intended use of real property as ground for vendor's equitable relief from contract and deed, 35 A.L.R.3d 1369.

Consumer class actions based on fraud or misrepresentation, 53 A.L.R.3d 534.

Modern status of rules regarding materiality and effect of false statement by insurance applicant as to previous insurance cancellations or rejections, 66 A.L.R.3d 749.

Fraud predicated on vendor's misrepresentation or concealment of danger of possibility of flooding or other unfavorable water conditions, 90 A.L.R.3d 568.

Misrepresentation in proxy solicitation — state cases, 20 A.L.R.4th 1287.

Vendor's action against vendee's prospective lender for misrepresentation respecting or failure to complete loan commitment, 30 A.L.R.4th 474.

Misrepresentation regarding sterility or use of birth control, 31 A.L.R.4th 389.

Liability of termite or other pest control or inspection contractor for work or representations, 32 A.L.R.4th 682.

Remedies for fraud or misrepresentation as to heating or cooling costs of realty purchased, 32 A.L.R.4th 828.

Real-estate broker's or agent's misrepresentation to, or failure to inform, vendor regarding value of vendor's real property, 33 A.L.R.4th 944.

Sexual partner's tort liability to other partner for fraudulent misrepresentation

regarding sterility or use of birth control resulting in pregnancy, 2 A.L.R.5th 301.

Parent's child support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy, 2 A.L.R.5th 337.

23-2-53. Suppression of fact as fraud.

Suppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.

History. — Orig. Code 1863, § 3106; Code 1868, § 3118; Code 1873, § 3175; Code 1882, § 3175; Civil Code 1895, § 4027; Civil Code 1910, § 4624; Code 1933, § 37-704.

Law reviews. — For article, "Common Fact Patterns of Stock Broker Fraud and Misconduct," see 7 Ga. St. B.J. 14 (2002).

For note as to recovery by home buyer for fraud in passive concealment by vendor, see 29 Mercer L. Rev. 323 (1977).

JUDICIAL DECISIONS

Suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud and the obligation to communicate may arise from the particular circumstances of the case. Brittain Bros. Co. v. Davis, 174 Ga. 1, 161 S.E. 841 (1931).

Suppression of the truth is not a fraud unless used as a means of deceiving another; no man is compelled to break silence and speak, unless there is an obligation resting upon him to speak. Georgia Real Estate Comm'n v. Brown, 152 Ga. App. 323, 262 S.E.2d 596 (1979).

Suppression of the truth constitutes fraud where there is an intentional concealment of a fact for the purpose of obtaining an advantage or a benefit. Georgia Real Estate Comm'n v. Brown, 152 Ga. App. 323, 262 S.E.2d 596 (1979).

Fraud in insurance dealings. — When the insured furnished false evidence which was relied upon by the insurance company in reinstating insurance policies he was guilty of fraud in law which would avoid the policy, whether he was in good or bad faith and whether he intended to deceive or not. New York Life Ins. Co. v. Odom, 93 F.2d 641 (5th Cir. 1937), cert. denied, 304 U.S. 566, 58 S. Ct. 948, 82 L. Ed. 1532 (1938); Life & Cas. Ins. Co. v. Davis, 62 Ga. App. 832, 10 S.E.2d 129 (1940).

Fraud committed by insurance company. — When the plaintiff, a woman so limited in education that she could not read and understand the meaning and effect of the instrument which she signed, surrendered, upon request of the manager of defendant insurance company, policy in which she was named beneficiary, premium receipt book and record of payments on the policy sued on, and was presented for signature and signed, a receipt or release from liability in consideration of the payment to her of $3.30, whereas the policy provided for payment of $51.75 upon death of the insured, it was a fraud upon plaintiff, under the circumstances, not to disclose to her the contents of the paper which defendant, through its manager requested her to sign. Industrial Life & Health Ins. Co. v. Johnson, 62 Ga. App. 630, 9 S.E.2d 121 (1940).

Rescission of real estate purchase contract. — In an action by a purchaser to rescind a contract for the purchase of real estate on the ground of the fraudulent concealment of a material fact, where the allegations of fact were insufficient to show actual fraud, in that there was no duty to communicate the material fact in question, which the purchaser could have discovered by exercising ordinary care, and there was no misrepresentations, no cause of action was stated. Kirven v.

Blackett, 208 Ga. 178, 65 S.E.2d 791 (1951).

This section expressly goes beyond the strict fiduciary relations of the parties. Cochran v. Murrah, 235 Ga. 304, 219 S.E.2d 421 (1975).

When persons sustain towards another a relation of trust and confidence, their silence when they ought to speak, or their failure to disclose what they ought to disclose, is so much a fraud in law as an actual affirmative false representation; mere silence on their part as to a cause, the facts giving rise to which it is their duty to disclose, amounts to a fraudulent concealment. Georgia Real Estate Comm'n v. Brown, 152 Ga. App. 323, 262 S.E.2d 596 (1979).

Constructive fraud "contrary to good conscience" requirement. — When there is no evidence of suppression, misrepresentation, concealment, or bad faith so as to impute moral guilt, the mere omission of a matter from a document coupled with the failure to reveal the omission can hardly be even constructive fraud unless it is "contrary to good conscience." Rhodes v. Perimeter Properties, Inc., 187 Ga. App. 55, 369 S.E.2d 332 (1988).

No obligation to disclose information equally available to both parties in arms-length business or contractual relationship. — While concealment of material facts may amount to fraud when the concealment is of intrinsic qualities the other party could not discover by the exercise of ordinary care, in an arms-length business or contractual relationship there is no obligation to disclose information which is equally available to both parties. Under such circumstances, actionable fraud cannot be shown unless the plaintiff exercised due care to discover the fraud. Southern Intermodal Logistics, Inc. v. Smith & Kelly Co., 190 Ga. App. 584, 379 S.E.2d 612 (1989).

There existed no confidential relationship between business and contractor who contracted on virtually equal terms and at arms-length, and where business elected to employ a separate contractor thereby electing not to rely solely on the first contractor. American Honda Motor Co. v. Williams & Assocs., 208 Ga. App. 636, 431 S.E.2d 437 (1993).

Attorney for opposing party had no duty to advise of legal rights. — In taxpayers' claim against a purchaser's assignee for rescission of a redemption agreement, the facts did not support rescission. The assignee's attorney did not defraud them or conceal any facts, but advised them to hire an attorney, and any failure to advise them of their legal rights was an opinion as to a matter of law and not a material fact. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

A buyer-seller relationship does not require that the buyer disclose information regarding the value of the seller's property. Butts v. Southern Clays, Inc., 215 Ga. App. 110, 450 S.E.2d 244 (1994).

Responsibilities of real estate brokers. — Listing broker was not obligated to communicate to the couple that the home they purchased was slightly smaller in size than the subdivision's model home the couple wanted duplicated on their lot as the purchase contract plainly stated that the couple had no right to rely on the listing broker as the couple's broker, that the couple had no confidential relationship with the listing broker, and that the couple was solely responsible for protecting the couple's own interests, as the couple was required to exercise due diligence before it could rely on the listing broker's representations and the couple did not do so. Middleton v. Troy Young Realty, Inc., 257 Ga. App. 771, 572 S.E.2d 334 (2002).

Potential buyer did not have a viable common law cause of action for fraud and deceit against a real estate broker and a real estate agent because, as set forth in O.C.G.A. § 10-6A-4(a), no confidential or fiduciary relationship was created between the buyer and the broker and the agent as a matter of law. Harrouk v. Fierman, 291 Ga. App. 818, 662 S.E.2d 892 (2008).

Failure to disclose decision bypassing real estate agent to avoid paying a commission was fraud. — Trial court erred in granting a directed verdict on a real estate agent's fraud claim against an owner for failing to disclose the owner's decision to directly engage a contractor presented to it by the agent, bypassing its commission agreement with the agent.

The economic loss rule did not bar the claim. ASC Constr. Equip. USA, Inc. v. City Commer. Real Estate, Inc., 303 Ga. App. 309, 693 S.E.2d 559 (2010).

Failure of insured not to supply health information. — The failure of the insured to supply information as to health problems when no inquiry is made by the insurer or its agents and neither the certificate or master policy of insurance inform the insured that certain illnesses are not covered will not raise a defense of fraud or material misrepresentation in a suit on a credit life insurance policy. Block v. Voyager Life Ins. Co., 251 Ga. 162, 303 S.E.2d 742 (1983).

No recovery for failure to disclose when no harm shown. — In a dispute between a concert booking agent and concert venue owners, the agent's fraud claim arising out of the owners' alleged promises to renew the agreement failed because the agent failed to show that the promises caused the agent harm. There was no evidence suggesting that the owners failed to disclose the owners' decision to terminate the agreement. Lucas Entm't Grp., LLC v. Robert W. Woodruff Arts Ctr., Inc., No. 17-11323, 2017 U.S. App. LEXIS 24339 (11th Cir. Dec. 1, 2017) (Unpublished).

Expert testimony was required. — Trial court did not err by granting a doctor summary judgment in a medical fraud suit because the suing patient failed to present expert testimony as to whether the pre-surgery x-rays should have put a doctor on notice of a deformity as such a determination was not within a layperson's common understanding and experience and, instead, required expert testimony. Johnson v. Johnson, 323 Ga. App. 836, 747 S.E.2d 518 (2013).

Land purchaser's duty to disclose mineral deposit. — The mere fact that purchaser of land alone had knowledge of a large kaolin deposit does not impose a duty on the purchaser to reveal this information to sellers. One's duty to disclose would arise from the confidential relations of the parties or from the particular circumstances of the case. McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992); Butts v. Southern Clays, Inc., 215 Ga. App. 110, 450 S.E.2d 244 (1994).

Withholding information about excavation site. — Withheld information appeared to have been material to a contractor's ability to prepare a responsible bid for a contract to excavate a site, where the withheld reports contained information about the presence of excessive moisture at the site and stated that the standard proctor test should be used rather than the more difficult modified proctor test required by the specifications, and that both the excavations and the fill should be dried before compaction. Such activity would have undoubtedly increased the cost of performance of the contract. Pinkerton & Laws Co. v. Roadway Express, Inc., 650 F. Supp. 1138 (N.D. Ga. 1986).

Evidence was sufficient to create an issue for jury determination as to whether real estate agent fraudulently failed to inform seller that documents executed at closing did not grant him a security interest in purchaser's property, as seller had requested. Welch v. Holley, 191 Ga. App. 532, 382 S.E.2d 128 (1989).

Trial court erred in granting summary judgment to the co-executors in a constructive fraud or conspiracy claim filed by the beneficiaries of an estate because it was necessary for a jury to decide whether the co-executors committed constructive fraud or engaged in a conspiracy. Bloodworth v. Bloodworth, 260 Ga. App. 466, 579 S.E.2d 858 (2003).

Nondisclosure. — Nondisclosure may provide the basis for constructive fraud where a party is under an obligation to communicate. First Union Nat'l Bank v. Davies-Elliot, Inc., 207 Ga. App. 791, 429 S.E.2d 161 (1993).

Even though a bank had a duty to notify its customer of a change in its signature verification procedures, where there was no evidence that the bank refrained from informing its customers in order to induce them to take or refrain from taking any certain action, there was no showing of constructive fraud. Eason Publications, Inc. v. Nationsbank, 217 Ga. App. 726, 458 S.E.2d 899 (1995).

Where a debtor failed to disclose to a creditor that business assets were no longer available to secure a loan upon its renewal, the debt was not dischargeable

in bankruptcy because the renewal was obtained by false pretenses. Suntrust Bank v. Brandon (In re Brandon), 297 B.R. 308 (Bankr. S.D. Ga. 2002).

Fraud may exist as much in intentional concealment of material facts as in false statements in regard to facts; one is as fraudulent as the other if it is used as a means of deceiving the opposite party. It was error to grant summary judgment where the facts indicated a deliberate concealment of assets with the possible intent to deprive a creditor of those assets. Miller v. Lomax, 266 Ga. App. 93, 596 S.E.2d 232 (2004).

Jury was properly instructed on fraud under O.C.G.A. § 23-2-53 because the obligation to communicate to a beneficiary by a trustee was not dictated by the existence of a fiduciary relationship and viable claims for constructive fraud had long been recognized in the absence of a fiduciary relationship under the particular circumstances of the case clause. McSweeney v. Kahn, No. 08-16196; No. 08-16515, 2009 U.S. App. LEXIS 20195 (11th Cir. Sept. 10, 2009).

Since the plaintiffs alleged that at the time the plaintiffs purchased the plaintiffs' vehicles, the manufacturer and the distributor failed to disclose to the plaintiffs or to the public the fact that there were underlying safety defects with the gasoline tanks in the models that the plaintiffs purchased, the plaintiffs plausibly alleged that the defendants omitted a material fact that the defendants had a duty to disclose under O.C.G.A. § 23-2-53 as the defects in the gasoline tanks were intrinsic qualities that could not have been discovered through the exercise of ordinary prudence and caution. McCabe v. Daimler AG, No. 1:12-cv-2494-TCB, 2013 U.S. Dist. LEXIS 80161 (N.D. Ga. June 7, 2013).

Trust's account statement failed to disclose straw man transaction with trustee. — Trust's account statement reflecting a sale of the principal asset of the trust was not a "report" because there was insufficient disclosure of the nature of the transaction to trigger the running of the shortened two-year limitation period under O.C.G.A. § 53-12-307(a). Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117 (2014).

Required elements of fraud not proven. — In an action by buyers of a distributorship of heavy equipment against the manufacturer of the distributorship's main product line, based on concealment of a pending joint venture, the buyers failed to prove the required elements of fraud. Williams v. Dresser Indus., Inc., 120 F.3d 1163 (11th Cir. 1997).

Prima facie case established. — District court found that land vendors presented a prima facie case of intentional fraudulent concealment concerning valuable mineral deposits against land purchasers. McLendon v. Georgia Kaolin Co., 837 F. Supp. 1231 (M.D. Ga. 1993).

A confidential and fiduciary relationship between brothers was not presumed when one of the brothers was aware that the other embezzled substantial amounts of money from their family business and that particular misconduct was the very subject under investigation. Wender & Roberts, Inc. v. Wender, 238 Ga. App. 355, 518 S.E.2d 154 (1999).

Negotiation of stock purchase agreement. — Although the defendants were directors of a corporation, they did not have a fiduciary duty to the plaintiff at the time of the negotiation of a stock purchase agreement; instead, the agreement was an arm's length transaction between persons experienced in the mining business and, therefore, there was no violation of O.C.G.A. § 23-2-53. Bogle v. Bragg, 248 Ga. App. 632, 548 S.E.2d 396 (2001).

In a putative class action, the particular circumstances of the case did not warrant the imposition of a duty under O.C.G.A. § 23-2-53 to disclose an alleged defect concerning a gasoline leak in the fuel tanks of the Georgia plaintiffs' vehicles since there was no evidence of any relationship between the defendants and the plaintiffs. McCabe v. Daimler AG, No. 1:12-CV-2494-MHC, 2015 U.S. Dist. LEXIS 176116 (N.D. Ga. Aug. 20, 2015).

Cited in Mangham v. Cobb, 160 Ga. 182, 127 S.E. 408 (1925); Information Buying Co. v. Miller, 173 Ga. 786, 161 S.E. 617 (1931); Floyd v. Boss, 174 Ga. 544, 163 S.E. 606 (1932); Morton v. Wallace, 177 Ga. 856, 171 S.E. 720 (1933); Blount v.

Dean, 187 Ga. 494, 1 S.E.2d 653 (1939); Patterson-Pope Motor Co. v. Ford Motor Co., 66 Ga. App. 41, 16 S.E.2d 877 (1941); Jones v. Hogans, 197 Ga. 404, 29 S.E.2d 568 (1944); Thompson v. Thompson, 203 Ga. 128, 45 S.E.2d 632 (1947); Whitfield v. Whitfield, 204 Ga. 64, 48 S.E.2d 852 (1948); Westbrook v. Beusse, 79 Ga. App. 654, 54 S.E.2d 693 (1949); Fuller v. Dillon, 220 Ga. 36, 136 S.E.2d 733 (1964); Hendrix v. Scarborough, 131 Ga. App. 342, 206 S.E.2d 42 (1974); Wilhite v. Mays, 239 Ga. 31, 235 S.E.2d 532 (1977); Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800 (1978); Duncan v. Poythress, 515 F. Supp. 327 (N.D. Ga. 1981); Everson v. Franklin Disct. Co., 248 Ga. 811, 285 S.E.2d 530 (1982); Davis v. Northside Realty Assocs., 165 Ga. App. 96, 299 S.E.2d 186 (1983); Smith v. Ross, 255 Ga. 193, 336 S.E.2d 39 (1985); Clay v. Department of Transp., 198 Ga. App. 155, 400 S.E.2d 684 (1990); Justus v. Justus, 198 Ga. App. 533, 402 S.E.2d 126 (1991); Tower Fin. Serv., Inc. v. Jarrett, 199 Ga. App. 248, 404 S.E.2d 622 (1991); First Union Nat'l Bank v. Gurley, 208 Ga. App. 647, 431 S.E.2d 379 (1993); Mabry v. Pelton, 208 Ga. App. 891, 432 S.E.2d 588 (1993); Saffar v. Chrysler First Bus. Credit Corp., 215 Ga. App. 239, 450 S.E.2d 267 (1994); Garbutt v. Southern Clays, Inc., 894 F. Supp. 456 (M.D. Ga. 1995); Boardman Petro., Inc. v. Federated Mut. Ins. Co., 926 F. Supp. 1566 (S.D. Ga. 1995); American Petro. Prods., Inc. v. Mom & Pop Stores, Inc., 231 Ga. App. 1, 497 S.E.2d 616 (1998); Hendry v. Wells, 286 Ga. App. 774, 650 S.E.2d 338 (2007); Wright v. Apt. Inv. & Mgmt. Co., 315 Ga. App. 587, 726 S.E.2d 779 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 12.

C.J.S. — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, § 15.

ALR. — Obligee's concealment of facts or evasive answers as fraud against surety, 8 A.L.R. 1485.

Seller's concealment of ownership of other property inducing exclusion of same from contract as actionable fraud, 26 A.L.R. 990.

Duty of vendor of real property to disclose to purchaser condition of building thereon which affects health or safety of persons using same, 141 A.L.R. 967.

What amounts to fraud on contractor, sustaining rescission or action for damages under building or construction contract, 166 A.L.R. 938.

Automobile insurance: concealment or nondisclosure of physical defects or conditions as avoiding coverage, 72 A.L.R.2d 804.

Liability of vendor of structure for failure to disclose that it was built on filled ground, 80 A.L.R.2d 1453.

Public contracts: duty of public authority to disclose contract or information, allegedly in its possession, affecting cost or feasibility of project, 86 A.L.R.3d 182.

Fraud predicated on vendor's misrepresentation or concealment of danger or possibility of flooding or other unfavorable water conditions, 90 A.L.R.3d 568.

23-2-54. Surprise as a form of fraud.

Anything which happens without the agency or fault of the party affected by it, tending to disturb and confuse his judgment or to mislead him, of which the opposite party takes an undue advantage, is in equity a surprise and is a form of fraud for which relief is granted.

History. — Orig. Code 1863, § 3111; Code 1868, § 3123; Code 1873, § 3180; Code 1882, § 3180; Civil Code 1895, § 4034; Civil Code 1910, § 4631; Code 1933, § 37-711.

JUDICIAL DECISIONS

Attorney for opposing party had no duty to advise of legal rights. — In taxpayers' claim against a purchaser's assignee for rescission of a redemption agreement, the facts did not support rescission. The assignee's attorney did not defraud them or conceal any facts, but advised them to hire an attorney, and any failure to advise them of their legal rights was an opinion as to a matter of law and not a material fact. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Cited in Bentley v. Barlow, 178 Ga. 618, 173 S.E. 707 (1934); Jackson v. Jackson, 202 Ga. 634, 44 S.E.2d 250 (1947); Puckett v. Reese, 203 Ga. 716, 48 S.E.2d 297 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 23.

C.J.S. — 30 C.J.S., Equity, §§ 45, 48.

23-2-55. Use of similar trademarks, names, or devices.

Any attempt to encroach upon the business of a trader or other person by the use of similar trademarks, names, or devices, with the intention of deceiving and misleading the public, is a fraud for which equity will grant relief.

History. — Orig. Code 1863, § 3112; Code 1868, § 3124; Code 1873, § 3181; Code 1882, § 3181; Civil Code 1895, § 4035; Civil Code 1910, § 4632; Code 1933, § 37-712.

Cross references. — Registration and use of trademarks and service marks generally, § 10-1-440.

JUDICIAL DECISIONS

Analysis

General Consideration
Prior Use
1. Trade Name
2. Color
Unfair Competition
1. In General
2. Confusing Similarity
3. Proof
A. In General
B. "Passing Off" Rule
C. Intent to Deceive

General Consideration

Construction of section. — This section is remedial in nature, is designed for the suppression of fraud, and should be liberally construed. Kay Jewelry Co. v. Kapiloff, 204 Ga. 209, 49 S.E.2d 19 (1948).

Application of section. — In place of an affirmative showing of specific intent, Georgia courts will apply this section when it is shown that: (1) the defendant was put on notice or had knowledge of the

plaintiff's trade name and (2) the similarity in names is likely to confuse or mislead the public. Thompson v. Alpine Motor Lodge, Inc., 296 F.2d 497 (5th Cir. 1961).

Damages already sustained recoverable. — Plaintiff seeking damages for trade name use infringement may seek recovery for damage already sustained where the illegal use has not ceased. Miller & Meier & Assocs. v. Diedrich, 174 Ga. App. 249, 329 S.E.2d 918, aff'd in part, rev'd in part on other grounds, 254 Ga. 734, 334 S.E.2d 308 (1985).

Cited in Gordy v. Dunwody, 209 Ga. 627, 74 S.E.2d 886 (1953); East Ga. Motor Club v. AAA Fin. Co., 212 Ga. 408, 93 S.E.2d 337 (1956); Royal v. Royal Poultry Co., 213 Ga. 813, 102 S.E.2d 44 (1958); Pearl Optical, Inc. v. Pearle Optical of Ga., Inc., 218 Ga. 701, 130 S.E.2d 223 (1963); Multiple Listing Serv. v. Metropolitan Multi-List, 225 Ga. 129, 166 S.E.2d 356 (1969); White's Wig Imports v. Wigmaster's Import Co., 226 Ga. 779, 177 S.E.2d 678 (1970); Tri-State Culvert Mfg., Inc. v. Tri-State Drainage Prods., Inc., 236 Ga. 157, 223 S.E.2d 202 (1976); Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc., 428 F. Supp. 689 (N.D. Ga. 1977); Robert B. Vance & Assocs. v. Baronet Corp., 487 F. Supp. 790 (N.D. Ga. 1979); Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 489 F. Supp. 174 (N.D. Ga. 1980); Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801 (11th Cir. 1985); Morton B. Katz & Assocs. v. Arnold, 175 Ga. App. 278, 333 S.E.2d 115 (1985).

Prior Use

1. Trade Name

Effect of prior use of trade name. — While generic names, geographical names, and names composed of words which are merely descriptive are incapable of exclusive appropriation, words or names which have a primary meaning of their own, such as words descriptive of the goods, service, or place where they are made, or the name of the maker, may nevertheless, by long use in connection with the business of the particular trade, come to be understood by the public as designating the goods, service, or business of a particular trader. Multiple Listing Serv., Inc. v. Metropolitan Multi-List, Inc., 223 Ga. 837, 159 S.E.2d 52 (1968), later appeal, Kidd v. Finch, 188 Ga. 492, 4 S.E.2d 187 (1939).

A person, by long and exclusive use, may acquire a trade name; and when thus acquired, such trade name is as much descriptive of the manufacturer or producer as is his own name, and the infringement of such trade name of an individual will be enjoined by a court of equity when a proper case is made. Womble v. Parker, 208 Ga. 378, 67 S.E.2d 133 (1951).

Knowledge of prior use of trade name raises presumption of fraud. — When a person knows of a trade name used by another person, and, notwithstanding this knowledge, uses a similar name in his own business operations, the courts will presume that he has encroached upon the name of the other intentionally and fraudulently. Womble v. Parker, 208 Ga. 378, 67 S.E.2d 133 (1951); Thompson v. Alpine Motor Lodge, Inc., 296 F.2d 497 (5th Cir. 1961).

Because plaintiff corporation produced no evidence from which a reasonable jury could have concluded that it had exclusively and continuously used "CCI" as a trade name such that it was entitled to trade name protection, the corporation's claim for trade name infringement under O.C.G.A. § 23-2-55 was summarily dismissed. Corrpro Cos. v. Meier, No. 3:03-CV-31 (CDL), 2007 U.S. Dist. LEXIS 74897 (M.D. Ga. Oct. 5, 2007).

2. Color

Effect of prior use of particular color. — While the color of merchandise or its wrapper or container may be one of the important indicia of a fraudulent purpose, if accompanied by other confusing factors such as size, shape, name, printing, or design in the make-up of the article, yet color alone, except possibly where some peculiar and distinctive combination of colors is employed, is not sufficient to establish fraudulent intent, since no one is permitted from the mere prior use of such an all-belonging thing as a color to obtain a monopoly in its use for any particular purpose. Seybold Baking Co. v.

Prior Use (Cont'd)
2. Color (Cont'd)

Derst Baking Co., 196 Ga. 391, 26 S.E.2d 536 (1943).

Testimony of defendant's manager, that he was forced to discontinue less expensive white waxed paper and use more costly "tango" colored cellophane wrapper for his whole wheat bread in order to meet the competition of the plaintiff, could not be taken to establish a fraudulent purpose as a matter of fact, when the act itself did not so indicate, where he also testified that cellophane was a more desirable and more attractive wrapper, and that the color was a more suitable and appropriate transparent wrapper for the brown bread, and where the product was without any other similarities as to the plainly printed labels both inside and outside the wrapper, the ones outside being strikingly different in color. Seybold Baking Co. v. Derst Baking Co., 196 Ga. 391, 26 S.E.2d 536 (1943).

Unfair Competition

1. In General

The general purpose of the law controlling trade names and unfair competition is the prevention of fraudulent interference with rights of the lawful holder of a trade name and protection of the public from imposition. Thompson v. Alpine Motor Lodge, Inc., 296 F.2d 497 (5th Cir. 1961).

The basic principle of the law of unfair competition is that no one has a right to dress up his goods or business or otherwise represent the same in such a manner as to deceive an intending purchaser and induce him to believe he is buying the goods of another, and that no one has the right to avail himself of another's favorable reputation in order to sell his own goods. Thompson v. Alpine Motor Lodge, Inc., 296 F.2d 497 (5th Cir. 1961).

The good will and reputation of a business is as much an asset as its physical properties, and it may as well be the subject of a fraudulent encroachment by an infringer. Kay Jewelry Co. v. Kapiloff, 204 Ga. 209, 49 S.E.2d 19 (1948).

An encroachment on the business of another may be made without direct market competition. Gordy v. Dunwody, 209 Ga. 627, 74 S.E.2d 886 (1953), later appeal, 210 Ga. 810, 83 S.E.2d 7 (1954).

The words "encroach upon the business of a trader" cannot be said to limit the equitable relief available to those in direct and actual market competition with an alleged infringer or to those cases where it is shown that there has been an actual diversion of trade from one business to another. Kay Jewelry Co. v. Kapiloff, 204 Ga. 209, 49 S.E.2d 19 (1948).

2. Confusing Similarity

Similarity must confuse the public. — Unless it appears that there is or will probably be a deception of ordinary buyers and the general public into thinking that the goods or business of one is the business or goods of another and thus bring about the sale of one man's goods as the goods of the other, the case is damnum absque injuria for which no action lies. Atlanta Paper Co. v. Jacksonville Paper Co., 184 Ga. 205, 190 S.E. 777 (1937).

While geographical names and words which are merely descriptive are not generally the subject of exclusive appropriation as trade-marks or trade-names, such names and words when used so long and exclusively by a trader, manufacturer, or producer that they are generally understood to designate his business or merchandise, may acquire a secondary signification or meaning indicative not only of the place of manufacture, but of the name of the manufacturer or producer, or of the character of the product, so that the name or title thus employed, including the geographical name and descriptive words, may be the subject of protection against unfair competition in trade, and authorize equity to enjoin a newcomer competitor from the appropriation and use of a trade-name or trade-mark bearing such resemblances to those of the pioneer as to be likely to produce uncertainty and confusion, and to pass off the goods or business of one as those of the other. Womble v. Parker, 208 Ga. 378, 67 S.E.2d 133 (1951).

Although the rights in a trade name are

exclusive within certain geographical limits, this section does not create rights good against anyone, anywhere. The outer limits are set by the requirement that the plaintiff must show a similarity that is confusing to the public. Thompson v. Alpine Motor Lodge, Inc., 296 F.2d 497 (5th Cir. 1961).

An infringement upon the real name or trade-name of an individual or corporation is such a colorable imitation of the name that the general public, in the exercise of ordinary care, might think that it is the name of the individual or corporation first appropriating the name. Multiple Listing Serv., Inc. v. Metropolitan Multi-List, Inc., 223 Ga. 837, 159 S.E.2d 52 (1968), later appeal, 225 Ga. 129, 166 S.E.2d 356 (1969).

Actual confusion. — Promoter presented sufficient evidence of the strength of the promoter's marks and of actual confusion amongst the relevant consumer class to avoid summary judgment, and the appellate court reversed the district court's grant of summary judgment for the group and remanded for trial on the claims of infringement under the Lanham Act, 15 U.S.C. § 1114, false designation of origin under 15 U.S.C. § 1125, deceptive trade practices under O.C.G.A. § 10-1-372 and unfair competition under O.C.G.A. § 23-2-55 et seq., because: (1) the car dealership promoter had shown actual confusion and the district court erred by overvaluing lack of confusion exhibited by the general public; (2) "Slash-It! Sales Event" attained federal incontestable status, so the district court erred in holding that the mark was merely descriptive and not entitled to strong protection; (3) the promoter created a disputed issue of material fact that the slasher slogans left the same impression, weighing in favor of likelihood of confusion; and (4) the similarities between the two sales allowed for the inference that a reasonable consumer could possibly attribute the products here to the same source. Caliber Auto. Liquidators, Inc. v. Premier Chrysler, Jeep, Dodge, LLC, 605 F.3d 931 (11th Cir. 2010).

Confusion found. — Summary judgment was inappropriate as to trademark infringement liability and unfair competition claims because while the "Xylem" mark was at least suggestive, the marks were substantially similar, and the trademark holder documented over 100 instances of actual confusion resulting from misdirected checks, phone calls, faxes, and emails, the court could not find that no reasonable juror would find there was no confusion created by the accused infringer's use of the Xylem name and mark. ITT Corp. v. Xylem Group, LLC, No. 1:11-cv-03669-WSD, 2013 U.S. Dist. LEXIS 109381 (N.D. Ga. Aug. 5, 2013).

3. Proof

A. In General

Grant of equitable relief notwithstanding absence of evidence of actual unfair competition authorized. — It is not essential, as a prerequisite to the granting of equitable relief in an action for infringement of a trade name, that actual and direct market competition between the litigants be shown, and that the test as to whether equitable relief is available, should not be limited to those cases where it is shown that there has been an actual diversion of trade from one business to another. Kay Jewelry Co. v. Kapiloff, 204 Ga. 209, 49 S.E.2d 19 (1948).

The early common-law rule, and the rule still maintained in some jurisdictions, has been to the effect that there must be shown actual or direct competition between the litigants as an essential prerequisite to relief in an action for infringement of a trade name or unfair trade competition. Under this view, the exclusive test is whether there is a diversion of trade from one business to another, and injury to the good will and reputation of the original user of the trade name, or other injuries as contemplated by the theories of relief afford no basis for equitable relief. Under the modern view, the emphasis is no longer on direct and actual market competition, or diversion of trade from one business to another, but rather on the injury suffered by the complaining party and the public from the confusion resulting from the infringer's acts. Kay Jewelry Co. v. Kapiloff, 204 Ga. 209, 49 S.E.2d 19 (1948).

Diversion of trade and the attendant

Unfair Competition (Cont'd)
3. Proof (Cont'd)
A. In General (Cont'd)

direct loss of sales is not the only injury that may result from infringement of a trade name, but other injuries would necessarily follow, such as an injury to the complaining party's reputation and good will. Kay Jewelry Co. v. Kapiloff, 204 Ga. 209, 49 S.E.2d 19 (1948).

Plaintiff's established infringement of trade name warranting injunction. — Plaintiffs made requisite showing that trade name reacquired upon foreclosure of their security interest had acquired such a secondary meaning and that defaulting buyers knowingly had adopted a confusingly similar name, which had in fact confused plaintiffs' former customers, thus entitling plaintiffs to injunction. Reis v. Ralls, 250 Ga. 721, 301 S.E.2d 40 (1983).

B. "Passing Off" Rule

The "passing off" rule is sufficient to afford a test as to whether there is unfair competition. The test under this rule is whether the goods or business of one are in fact "passed off" as the goods or business of another, and it has been said, in cases between litigants in actual and direct market competition, that nothing less than such conduct will constitute unfair competition. Kay Jewelry Co. v. Kapiloff, 204 Ga. 209, 49 S.E.2d 19 (1948).

Actionable unfair competition. — Any conduct, the nature and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for the goods or business of another, constitutes actionable unfair competition. The essence thereof consists in the sale of the goods of one manufacturer or vendor for those of another. Atlanta Paper Co. v. Jacksonville Paper Co., 184 Ga. 205, 190 S.E. 777 (1937).

Any conduct, the nature and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for the goods or business of another, constitutes actionable unfair competition. Thompson v. Alpine Motor Lodge, Inc., 296 F.2d 497 (5th Cir. 1961).

C. Intent to Deceive

Intent to deceive public as basis of unfair competition. — In Georgia, to have a word or words claimed as a trade mark protected by injunction from use by another, it should appear that the defendant's use of them was with intent to deceive or mislead the public. Atlanta Paper Co. v. Jacksonville Paper Co., 184 Ga. 205, 190 S.E. 777 (1937).

Relief depends upon showing of intent to deceive. However, this intent may be presumed if encroachment is done with knowledge of the prior right. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683 (1981).

Words, acts and conduct prove intent, and are the usual and ordinary means adopted by courts of justice to establish it. Thompson v. Alpine Motor Lodge, Inc., 296 F.2d 497 (5th Cir. 1961).

Although intent must be found to warrant an injunction, when it comes to finding intent courts look to the effect of a defendant's "words, acts and conduct" and ask the objective questions of whether the plaintiff held an exclusive right to the trade mark or name and whether the defendant encroached upon it. Thompson v. Alpine Motor Lodge, Inc., 296 F.2d 497 (5th Cir. 1961).

Finding of intent to deceive. — Injunctive relief cannot be grounded on O.C.G.A. § 23-2-55 if the court makes no finding of intent to deceive. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683 (1981).

Intent may be presumed if encroachment is done with knowledge of the prior right. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683 (1981).

Knowing and willing participant in alteration of cellular telephones. — Because plaintiff cellular telephone trademark holder's complaint properly alleged that defendant competitor was a knowing and willing participant in an enterprise that bought the holder's phones in bulk then altered the phones to circumvent prepaid airtime then resold those phones under the holder's marks, the complaint

properly stated claims for unfair competition and deceptive trade practices. Tracfone Wireless, Inc. v. Zip Wireless Prods., 716 F. Supp. 2d 1275 (N.D. Ga. 2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 257.

Am. Jur. Pleading and Practice Forms. — 23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 78.

C.J.S. — 30 C.J.S., Equity, § 48.

ALR. — Protection of business or trading corporation against use of same or similar name by another corporation, 115 A.L.R. 1241.

Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 A.L.R. 1067.

Use of "family name" by corporation as unfair competition, 72 A.L.R.3d 8.

23-2-56. Consummation of fraud.

Fraud may be consummated by signs or tricks, or through agents employed to deceive, or by any other unfair way used to cheat another.

History. — Orig. Code 1863, § 3107; Code 1868, § 3119; Code 1873, § 3176; Code 1882, § 3176; Civil Code 1895, § 4028; Civil Code 1910, § 4625; Code 1933, § 37-705.

JUDICIAL DECISIONS

Complaint sufficiently set forth fraud allegations. — Trial court erred by dismissing the plaintiff's complaint for failure to state a claim because the plaintiff pled viable claims for fraud, negligent misrepresentation, and civil racketeering based on the defendant filing a medical lien seeking full chargemaster rate or sticker price of the defendant's medical procedures, which did not represent a reasonable charge for the treatment received with the intent to collect more than a reasonable charge for the services rendered to the plaintiff. Clouthier v. Medical Center of Central Georgia, Inc., 351 Ga. App. 883, 833 S.E.2d 584 (2019).

Post-nuptial agreement procured by fraud. — After the husband engaged counsel to draw up a formal post-nuptial agreement, and the husband moved to enforce the agreement when the wife filed for divorce, the post-nuptial agreement was unenforceable as the wife testified that the wife signed the agreement because the husband represented to the wife that, if the wife signed the agreement, the husband would understand that the wife loved the husband, and the husband would tear up the agreement; the husband procured the wife's signature on the agreement under the pretense that the agreement would never be enforced and, in fact, that the agreement would be destroyed, and the evidence was sufficient to establish the existence of fraud in procuring the agreement. Murray v. Murray, 299 Ga. 703, 791 S.E.2d 816 (2016).

Cited in Floyd v. Boss, 174 Ga. 544, 163 S.E. 606 (1932); Jenkins v. Cobb, 47 Ga. App. 456, 170 S.E. 698 (1933); Morton v. Wallace, 177 Ga. 856, 171 S.E. 720 (1933); Hogg v. Hogg, 206 Ga. 691, 58 S.E.2d 403 (1950); Treadwell v. Treadwell, 216 Ga. 156, 115 S.E.2d 535 (1960); Gaines v. Watts, 224 Ga. 321, 161 S.E.2d 830 (1968); Patterson v. Castellaw, 119 Ga. App. 712, 168 S.E.2d 838 (1969); Watts v. Gaines, 226 Ga. 503, 175 S.E.2d 871 (1970); Ringer v. Lockhart, 240 Ga. 82, 239 S.E.2d 349 (1977); Georgia Farm Bureau Mut. Ins. Co. v. First Fed. Sav. & Loan Ass'n, 152 Ga. App. 16, 262 S.E.2d 147 (1979); McGaha v. Kwon, 161 Ga. App. 216, 288 S.E.2d 289 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 12 et seq.

C.J.S. — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, § 1 et seq.

ALR. — False representations in business transaction as within statute relating to "confidence game", 9 A.L.R. 1527; 56 A.L.R. 727.

Use of mails for sale of articles having superstitious associations, 34 A.L.R. 1292.

Genuine making of instrument for purpose of defrauding as constituting forgery, 41 A.L.R. 229; 46 A.L.R. 1529; 51 A.L.R. 568.

23-2-57. Proving existence of fraud.

Fraud may not be presumed but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence.

History. — Orig. Code 1863, § 2715; Code 1868, § 2709; Code 1873, § 2751; Code 1882, § 2751; Civil Code 1895, § 4029; Civil Code 1910, § 4626; Code 1933, § 37-706.

JUDICIAL DECISIONS

Analysis

General Consideration
Proving Existence of Fraud
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General Consideration

This section is particularly applicable in family transactions. Mattox v. West, 194 Ga. 310, 21 S.E.2d 428 (1942).

This section is peculiarly applicable in transactions between husband and wife. Strobel v. Gormley, 50 Ga. App. 358, 178 S.E. 192 (1935).

Section not applicable to suits to set aside judgments. — Rule that fraud may be shown by slight circumstances, contained in O.C.G.A. § 23-2-57, is not applicable to suits to set aside judgments. Leventhal v. Citizens & S. Nat'l Bank, 249 Ga. 390, 291 S.E.2d 222 (1982).

Fraud may not be presumed, and while it may be proved by circumstances, it must nevertheless be proved. Adams v. Higginbotham, 194 Ga. 292, 21 S.E.2d 616 (1942); Kazakos v. Soteres, 120 Ga. App. 258, 170 S.E.2d 50 (1969); Henry v. Allstate Ins. Co., 129 Ga. App. 223, 199 S.E.2d 338 (1973).

Though a transaction between near relatives is to be scanned closely, yet some proof of its fraudulent nature must appear, and until that proof appears this rule has no application. Kamlapat v. Purvis-Wade Carpet Mills, 112 Ga. App. 781, 146 S.E.2d 138 (1965).

Circumstances creating a mere suspicion are not sufficient to prove fraud. Watson v. Brown, 186 Ga. 728, 198 S.E. 732 (1938); Kamlapat v. Purvis-Wade Carpet Mills, 112 Ga. App. 781, 146 S.E.2d 138 (1965).

Fraud is "in itself subtle," and circumstances apparently trivial or almost inconclusive, if separately considered, may by their number and joint operation be sufficient to constitute conclusive proof. Grainger v. Jackson, 122 Ga. App. 123, 176 S.E.2d 279 (1970); McNeil v. Cowart, 186 Ga. App. 411, 367 S.E.2d 291 (1988); Lloyd v. Kramer, 233 Ga. App. 372, 503 S.E.2d 632 (1998).

Transfers of assets before death. — Evidence was sufficient to sustain the jury's verdict under the plaintif's theory of fraudulent transfer and civil conspiracy as some evidence authorized the jury to

find that a deed conveying the property owner's sole interest to the real property to the owner and one defendant as joint tenants with right of survivorship without any money exchanged prior to death was to evade the plaintiff before a promissory note was paid. Bloom v. Camp, 336 Ga. App. 891, 785 S.E.2d 573 (2016).

Fraud in post-nuptial agreements. — After the husband engaged counsel to draw up a formal post-nuptial agreement, and the husband moved to enforce the agreement when the wife filed for divorce, the post-nuptial agreement was unenforceable as the wife testified that the wife signed the agreement because the husband represented to the wife that, if the wife signed the agreement, the husband would understand that the wife loved the husband, and the husband would tear up the agreement; the husband procured the wife's signature on the agreement under the pretense that the agreement would never be enforced and, in fact, that the agreement would be destroyed, and the evidence was sufficient to establish the existence of fraud in procuring the agreement. Murray v. Murray, 299 Ga. 703, 791 S.E.2d 816 (2016).

Cited in Haas & Howell v. Godby, 33 Ga. App. 218, 125 S.E. 897 (1924); Carter v. Moody, 160 Ga. 849, 129 S.E. 163 (1925); Boyles v. Morgan, 168 Ga. 804, 149 S.E. 149 (1929); Citizens & S. Nat'l Bank v. Kontz, 185 Ga. 131, 194 S.E. 536 (1937); Dwight v. Acme Lumber & Supply Co., 189 Ga. 473, 6 S.E.2d 586 (1939); Durham Iron Co. v. Durham, 62 Ga. App. 361, 7 S.E.2d 804 (1940); Horton v. Johnson, 192 Ga. 338, 15 S.E.2d 605 (1941); Quinton v. Peck, 195 Ga. 299, 24 S.E.2d 36 (1943); Jones v. Hogans, 197 Ga. 404, 29 S.E.2d 568 (1944); Scott v. Gillis, 202 Ga. 220, 43 S.E.2d 95 (1947); Boney v. Smallwood, 202 Ga. 411, 43 S.E.2d 271 (1947); Hinchcliffe v. Pinson, 87 Ga. App. 526, 74 S.E.2d 497 (1953); Rountree v. Davis, 90 Ga. App. 223, 82 S.E.2d 716 (1954); Tillman v. Byrd, 211 Ga. 918, 89 S.E.2d 479 (1955); Griffin v. Kelley, 227 F.2d 258 (5th Cir. 1955); Sutton v. McMillan, 213 Ga. 90, 97 S.E.2d 139 (1957); Leverett v. Awnings, Inc., 97 Ga. App. 811, 104 S.E.2d 686 (1958); Walker v. General Ins. Co., 214 Ga. 758, 107 S.E.2d 836 (1959); Powell v. Grimes, 223 Ga. 56, 153 S.E.2d 434 (1967); Patterson v. Castellaw, 119 Ga. App. 712, 168 S.E.2d 838 (1969); Parker v. Spurlin, 227 Ga. 183, 179 S.E.2d 251 (1971); Darden v. Darden, 227 Ga. 647, 182 S.E.2d 480 (1971); W.H. Mulherin Constr. Co. v. Betterton, 135 Ga. App. 223, 217 S.E.2d 454 (1975); Clark v. Aenchbacher, 143 Ga. App. 282, 238 S.E.2d 442 (1977); Tolar Constr. Co. v. GAF Corp., 154 Ga. App. 127, 267 S.E.2d 635 (1980); Bob Maddox Dodge, Inc. v. McKie, 155 Ga. App. 263, 270 S.E.2d 690 (1980); Rose Mill Homes, Inc. v. Michel, 155 Ga. App. 808, 273 S.E.2d 211 (1980); Sanders v. Looney, 247 Ga. 379, 276 S.E.2d 569 (1981); Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981); Everson v. Franklin Disct. Co., 248 Ga. 811, 285 S.E.2d 530 (1982); McGaha v. Kwon, 161 Ga. App. 216, 288 S.E.2d 289 (1982); Plough Broadcasting Co. v. Dobbs, 163 Ga. App. 264, 293 S.E.2d 526 (1982); Marshall v. York, 165 Ga. App. 795, 302 S.E.2d 711 (1983); Lenny's, Inc. v. Allied Sign Erectors, Inc., 170 Ga. App. 706, 318 S.E.2d 140 (1984); Macon Chrysler-Plymouth v. Sentell, 179 Ga. App. 754, 347 S.E.2d 639 (1986); Jackson v. Paces Ferry Dodge, Inc., 183 Ga. App. 502, 359 S.E.2d 412 (1987); Graham v. Hogan, 185 Ga. App. 842, 366 S.E.2d 219 (1988); Harden v. Vertex Assocs., 226 Ga. App. 322, 487 S.E.2d 12 (1997); Chandler v. MVM Constr., Inc., 232 Ga. App. 385, 501 S.E.2d 533 (1998); ReMax North Atlanta v. Clark, 244 Ga. App. 890, 537 S.E.2d 138 (2000).

Proving Existence of Fraud

Proof of fraud generally. — Since proof of fraud is seldom if ever possible by direct evidence, recourse to circumstantial evidence is a necessity, and there is no kind of action wherein it can be held with greater reason that the fact in issue may be inferred from other facts proved. Durrence v. Durrence, 224 Ga. 620, 163 S.E.2d 740 (1968).

Rarely, if ever, can a fraudulent intent be shown by direct proof, and when transactions between relatives are under review, slight circumstances are often sufficient to induce belief on the part of the jury that there was fraud between

Proving Existence of Fraud (Cont'd)

the parties. Bucher v. Murray, 212 Ga. 259, 91 S.E.2d 610 (1956).

Attack on wills. — An attack on a will as having been obtained by undue influence may be supported by a wide range of testimony, since such influence can seldom be shown except by circumstantial evidence. Thus, a confidential relation between the parties, the reasonableness or unreasonableness of the disposition of the testator's estate, old age, or disease affecting the strength of the mind, tending to support any other direct testimony or any other proven fact or circumstance going to show the exercise of undue influence on the mind and will of the testator, are relevant. While the quantity of influence varies with the circumstances of each case, according to the relations existing between the parties and the strength or weakness of mind of the testator, the amount of influence necessary to dominate a mind impaired by age or disease may be decidedly less than that required to control a strong mind. Bowman v. Bowman, 205 Ga. 796, 55 S.E.2d 298 (1949).

Amount of influence required to control weak versus strong mind. — According to the relations existing between the parties and the strength or weakness of mind of a testator, the amount of influence necessary to dominate a mind impaired by age or disease may be decidedly less than that required to control a strong mind. Fowler v. Fowler, 197 Ga. 53, 28 S.E.2d 458 (1943).

Grantor under influence of family member. — Where the grantor of an "improvident or profuse" deed was not wholly incapable of entering into such a contract, but was possessed of little or no will power and was greatly under the influence of the nephew to whom the deed was executed, an inference of fraud could have been drawn by the jury, and, the evidence for the defendant grantee not being such as to rebut the inference as a matter of law, the court was authorized to charge the jury upon the subject of fraud. Stanley v. Stanley, 179 Ga. 135, 175 S.E. 496 (1934).

Broad statement of fraud insufficient. — While the broad statement that the conduct of the defendant constituted fraud would be insufficient without an allegation of circumstances from which the court might determine whether the pleader reached the right conclusion in saying that a fraud was committed, still it is not essential to state more facts than may be necessary to carry conviction of the existence of fraud. Wall v. Wall, 176 Ga. 757, 168 S.E. 893 (1933).

Setting aside deed in equity. — "Great inadequacy of consideration, joined with great disparity of mental ability in contracting a bargain, may justify equity in setting aside a sale or other contract." Under that principle, a deed may be set aside in equity, on proof to the two elements stated, "without proof of anything else" as to fraud. A fortiori, the same rule would apply with at least equal force in case of such mental disparity and a total absence of consideration. Stow v. Hargrove, 203 Ga. 735, 48 S.E.2d 454 (1948).

Imbalance of mental abilities. — The evidence showing that a 75-year old woman, uneducated, with neither the ability to read nor write, was dealing with an experienced businessman under circumstances indicating a fraud establishes that there was an imbalance or "disparity of mental ability in contracting a bargain." Top Quality Homes, Inc. v. Jackson, 231 Ga. 844, 204 S.E.2d 600 (1974).

Trivial things together can be conclusive proof. — Circumstances apparently trivial or almost inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. Kelly v. Cubbedge, 143 Ga. App. 830, 240 S.E.2d 162 (1977).

Proof of fraud is seldom, if ever, susceptible of direct proof; thus, recourse to circumstantial evidence usually is required. Brown v. Mann, 237 Ga. App. 247, 514 S.E.2d 922 (1999).

In every case slight circumstances must be considered, and may be sufficient to establish the existence of fraud, in transactions between husband and wife fraud might be so completely concealed that creditors could not expose it, and in order that the public might not

suffer from such concealment, the law imposes upon the husband and wife the duty of affirmatively establishing their good faith when creditors attack such transactions for fraud. Arrington v. Awbrey, 190 Ga. 193, 8 S.E.2d 648 (1940).

Slight circumstances often sufficient in transactions between relatives. — When transactions between relatives are under review, slight circumstances are often sufficient to induce belief on the part of a jury that there was fraud or collusion between the parties, and authorize them to find against the claimant and in favor of the plaintiff in fi. fa. A claimant must, generally speaking, come into court with hands unstained by any suggestion of collusion with the defendant in fi. fa. to defeat or defraud the creditors of the latter; and a claimant who fails to make a clear showing of both legal and moral right to the property in dispute must generally suffer the loss thereof at the hands of a jury, if there be any circumstances in proof, even though slight, which may be sufficient to authorize the inference of fraud or collusion. Scruggs v. Blackshear Mfg. Co., 49 Ga. App. 205, 174 S.E. 732 (1934).

Since fraud is inherently subtle, slight circumstances of fraud may be sufficient to establish a proper case. Brown v. Mann, 237 Ga. App. 247, 514 S.E.2d 922 (1999).

Evidence of fraud to be of "clear, unequivocal, and decisive" quality. — In a diversity based suit in equity to set aside or deny res judicata effect to a prior state court judgment on the grounds of fraud and mutual mistake, the plaintiffs had to prove their claims by something more than a mere preponderance of the evidence. The evidence had to preponderate in the plaintiffs' favor, but it also had to be of "clear, unequivocal, and decisive" quality. Ahrens v. Katz, 595 F. Supp. 1108 (N.D. Ga. 1984).

Sufficient evidence to create jury issue as to fraud. — See Gibbs v. Jim Wilson Chevrolet Co., 161 Ga. App. 171, 288 S.E.2d 264 (1982); Horne v. Claude Ray Ford Sales, Inc., 162 Ga. App. 329, 290 S.E.2d 497 (1982); Minuteman Press Int'l, Inc. v. Hedrick, 167 Ga. App. 453, 306 S.E.2d 718 (1983).

Jury to determine fraud in automobile odometer case. — When the evidence established that at time automobile was purchased by seller of automobile the certificate of ownership listed 14,229 miles as the car's mileage, that when it was sold by seller to buyer, the odometer read 14,179 miles, and when the buyers test-drove the car the odometer read approximately 7,000 miles, there is considerable conflict regarding the actual mileage of the car, and it is the province of the jury to determine whether seller altered or knew of the alteration of the odometer. Joseph Charles Parrish, Inc. v. Hill, 173 Ga. App. 97, 325 S.E.2d 595 (1984).

Jury could have found that at least some of the numerous repairs a buyer made to a house after discharging a contractor were to correct defects the contractor passively concealed that the buyer could not have reasonably discerned. Since O.C.G.A. § 23-2-57 provides that slight circumstances may be sufficient to prove fraud, the contractor was not entitled to a directed verdict in the contractor's favor on the buyer's fraud claim. Lumpkin v. Deventer N. Am., Inc., 295 Ga. App. 312, 672 S.E.2d 405 (2008).

Trial court erred in granting summary judgment to a surety because jury questions existed as to whether two subcontractors were the same company, whether an owner acted as an agent on behalf of one of those subcontractors when the owner procured the bonds, and whether the bonds were intentionally written fraudulently based on admissions made by counsel for the surety during the hearing. Choate Constr. Co. v. Auto-Owners Ins. Co., 318 Ga. App. 682, 736 S.E.2d 443 (2012).

Evidence insufficient to go to the jury. — In taxpayers' claim against a purchaser's assignee for rescission of a redemption agreement, the facts did not support rescission. The assignee's attorney did not defraud them or conceal any facts, but advised them to hire an attorney, and any failure to advise them of their legal rights was an opinion as to a matter of law and not a material fact. Boyd v. JohnGalt Holdings, LLC, 294 Ga.

Proving Existence of Fraud (Cont'd)

640, 755 S.E.2d 675 (2014).

Pleading and Practice

Slight evidence of fraud and undue influence may authorize the jury to cancel the deed. Harper v. Harper, 229 Ga. 583, 193 S.E.2d 616 (1972).

When the facts and circumstances shown by the evidence submitted by both parties on a motion for summary judgment are sufficient to authorize inferences as to fraudulent intent, the issue should be resolved by a jury on a trial, as there is a genuine issue of material fact. Nixon v. Brown, 225 Ga. 811, 171 S.E.2d 512 (1969).

Evidence necessary to defeat abusive litigation claim. — In a suit for fraud, misrepresentation, and civil conspiracy allegedly arising out of a real estate transaction, and a counterclaim for abusive litigation, where the record revealed hotly contested versions of what the parties considered to have transpired in the complex real estate transaction, given that the law requires only slight circumstances to establish fraud and conspiracy, the trial judge was authorized to find as a matter of law that the plaintiffs had pierced an essential element of the defendant's abusive litigation claim and were thus entitled to the grant of summary judgment thereon. Seckinger v. Holtzendorf, 200 Ga. App. 604, 409 S.E.2d 76, cert. denied, 200 Ga. App. 897, 409 S.E.2d 76 (1991).

Whether a note or other writing was procured by fraud is a question of fact for the determination of a jury. Thompson v. Wilkins, 143 Ga. App. 739, 240 S.E.2d 183 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 468 et seq.

Am. Jur. Proof of Facts. — Fraudulent Alteration of Odometer, 1 POF2d 677.

C.J.S. — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, § 94 et seq.

23-2-58. (For effective date, see note.) Confidential relations defined.

Any relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners; principal and agent; guardian or conservator and minor or ward; personal representative or temporary administrator and heir, legatee, devisee, or beneficiary; trustee and beneficiary; and similar fiduciary relationships.

History. — Orig. Code 1863, § 3108; Code 1868, § 3120; Code 1873, § 3177; Code 1882, § 3177; Civil Code 1895, § 4030; Civil Code 1910, § 4627; Code 1933, § 37-707; Ga. L. 2020, p. 377, § 2-26/HB 865.

Delayed effective date. — This Code section, as set out above, becomes effective January 1, 2021. For version of this Code section in effect until January 1, 2021, see the 2020 amendment note.

The 2020 amendment, effective January 1, 2021, substituted "partners; principal and agent; guardian or conservator and minor or ward; personal representative or temporary administrator and heir,

legatee, devisee, or beneficiary; trustee and beneficiary; and similar fiduciary relationships" for "partners, principal and agent, etc" at the end of the Code section.

Cross references. — Agency generally, T. 10, C. 6. Confidential relationships for purposes of exclusion of evidence, § 24-5-501 et seq.

Law reviews. — For annual survey article discussing wills, trusts and administration of estates, see 52 Mercer L. Rev. 481 (2000). For article, "Georgia's Law of Undue Influence in Gift-Making," see 5 Ga. St. B.J. 12 (2000). For article, "Common Fact Patterns of Stock Broker Fraud and Misconduct," see 7 Ga. St. B.J. 14 (2002). For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004). For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007). For article, "Holmes v. Grubman: The Supreme Court of Georgia Balances Financial Advisor Common Law Liability and Investor Protection," see 16 (No. 5) Ga. St. B.J. 20 (2011). For article, "What Duty of Care Does a Homeowner Association Owe Its Members?," see 22 Ga. St. Bar J. 19 (Dec. 2016).

For note, "The Great Escape: How One Plaintiff's Sidestep of a Mandatory Arbitration Clause Was Applied to a Class in Bickerstaff v. SunTrust Bank," see 68 Mercer L. Rev. 539 (2017).

JUDICIAL DECISIONS

Analysis

General Consideration
Confidential Relations Generally
1. In General
2. Specific Relationships
Presumption of Undue Influence

General Consideration

This section is not applicable to confidential relations for the purposes of exclusion of evidence. Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492 (1976).

Because there was no evidence of a confidential relationship between a manufacturer and a broker beyond the contractual obligation for the broker to post bonds on behalf of the manufacturer, and the broker did not act on the manufacturer's behalf in any business transactions and was obligated only to secure the posting of the needed bonds, it was nothing more than an arms-length transaction, and the trial court's charge to the jury on agency and fiduciary relationships was error. Aon Risk Servs. v. Commercial & Military Sys. Co., 270 Ga. App. 510, 607 S.E.2d 157 (2004).

Confidential relationship distinguished from trade secret. — An item may be considered confidential in the context of a business relationship without rising to the level of a trade secret. A confidential relationship is distinguished by the expectations of the parties involved, while a secret is identified through rigorous examination of the information sought to be protected. Roboserve, Ltd. v. Tom's Foods, Inc., 931 F.2d 789 (11th Cir. 1991).

There is never a presumption of confidential relationship. The burden is upon the party asserting the relationship to establish its existence. United States ex rel. Meva Corp. v. Northeast Constr. Co., 298 F. Supp. 1135 (S.D. Ga. 1969); Anderson Chem. Co. v. Portals Water Treatment, Inc., 768 F. Supp. 1568 (M.D. Ga. 1991), aff'd in part, rev'd in part, 971 F.2d 756 (11th Cir. 1992).

A confidential relationship does not exist prior to the contract or legal relationship creating it, unless it exists for other reasons. Cole v. Cates, 113 Ga. App. 540, 149 S.E.2d 165 (1966).

Whether or not the confidential relationship of partners applies to trans-

General Consideration (Cont'd)

actions outside of the scope of the partnership, it does not apply where it appears that the partnership was not in existence at the time of the transaction under consideration. Hancock v. Gunter, 195 Ga. 646, 24 S.E.2d 772 (1943).

Fiduciary relationship must exist. — In order for this O.C.G.A. § 23-2-58 to be applicable, a definite fiduciary relationship must exist between plaintiff and the other party. Anderson Chem. Co. v. Portals Water Treatment, Inc., 768 F. Supp. 1568 (M.D. Ga. 1991), aff'd in part, rev'd in part, 971 F.2d 756 (11th Cir. 1992).

Summary judgment was properly granted to the defendants on the plaintiff's breach of fiduciary duties in a partnership venture claim because the plaintiff never argued during the summary judgment phase that a confidential relationship existed between the parties as partners. Laymac v. Kushner, 349 Ga. App. 727, 824 S.E.2d 768 (2019), cert. denied, No. S19C1091, 2019 Ga. LEXIS 871 (Ga. 2019).

Aiding and abetting breach of fiduciary duty. — Georgia law does not recognize the tort of aiding and abetting a breach of fiduciary duty, and a Georgia court faced with the issue would not be likely to create such a cause of action since the imposition of aider and abettor liability for such breaches essentially extends fiduciary obligations beyond the scope of the confidential or special relationship upon which these duties are based. Munford, Inc. v. Munford, 188 Bankr. 860 (N.D. Ga. 1994), aff'd, 97 F.3d 449 (11th Cir. 1996), 97 F.3d 456 (11th Cir. 1996), aff'd on other grounds, 98 F.3d 604 (11th Cir. 1996).

Party to confidential relationship may rely upon representations of other party. — The reason for the rule that a party to a confidential or fiduciary relationship may rely upon representations made is that by the very terms or circumstances of the arrangement of dealings between the parties there rests upon the party acting for another the duty of protecting and furthering the interests of the person for whom he is acting, not those of himself or of any one else. The person so placing trust in him by virtue of this confidential relationship is justified by the situation of this interest in believing that the other party will act fairly and make true representations. Dover v. Burns, 186 Ga. 19, 196 S.E. 785 (1938).

Required degree of care to detect fraud is much less when there is a confidential relationship between two parties than in cases when parties deal at arm's length. United States ex rel. Meva Corp. v. Northeast Constr. Co., 298 F. Supp. 1135 (S.D. Ga. 1969).

Failure to protect confidential information. — Dismissal of the plaintiff's cause of action against a state agency for disclosure of private information for failure to state a cause of action was affirmed because in alleging that the plaintiff gave the agency personal information as a prerequisite to receiving services, with the expectation that it would protect the plaintiff's information, the plaintiff failed to assert in the complaint facts showing that the agency owed the plaintiff a confidential duty to protect that information. McConnell v. Department of Labor, 337 Ga. App. 457, 787 S.E.2d 794 (2016).

Ordinary diligence not required when confidential relationship exists. — The numerous decisions to the effect that a party who can read must read, and that fraud which will relieve a party who can read must be such as prevents the party from reading, apply to situations where the parties are dealing with each other at arms length, and have no application to a situation where the confidential and fiduciary relation of principal and agent is involved. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214 (1958); Allen v. Sanders, 176 Ga. App. 647, 337 S.E.2d 428 (1985).

Bankruptcy. — O.C.G.A. § 23-2-58 does not create the kind of trust necessary to create a fiduciary relationship under the federal bankruptcy law. Blashke v. Standard, 123 Bankr. 444 (Bankr. N.D. Ga. 1991).

Cited in Boyles v. Morgan, 168 Ga. 804, 149 S.E. 149 (1929); White v. Dotson, 41 Ga. App. 436, 153 S.E. 233 (1930); Herrington v. Herrington, 42 Ga. App. 126, 155 S.E. 51 (1930); Allen v. Southern Ins. Sec. Corp., 54 Ga. App. 316, 187 S.E.

714 (1936); Blount v. Dean, 187 Ga. 494, 1 S.E.2d 653 (1939); Armour v. Lunsford, 192 Ga. 598, 15 S.E.2d 886 (1941); Manning v. Wills, 193 Ga. 82, 17 S.E.2d 261 (1941); Dorsey v. Green, 204 Ga. 453, 49 S.E.2d 901 (1948); Larkins v. Boyd, 205 Ga. 69, 52 S.E.2d 307 (1949); Hogg v. Hogg, 206 Ga. 691, 58 S.E.2d 403 (1950); Childs v. Shepard, 213 Ga. 381, 99 S.E.2d 129 (1957); Dixie Belle Mills, Inc. v. Specialty Mach. Co., 217 Ga. 104, 120 S.E.2d 771 (1961); Johnson v. Hutchinson, 217 Ga. 489, 123 S.E.2d 551 (1962); Rushing v. Bashlor, 219 Ga. 119, 131 S.E.2d 775 (1963); Brogdon v. Purvis, 220 Ga. 28, 136 S.E.2d 719 (1964); Fuller v. Dillon, 220 Ga. 36, 136 S.E.2d 733 (1964); Weddle v. Webb, 224 Ga. 674, 164 S.E.2d 129 (1968); Bloodworth v. Bloodworth, 224 Ga. 717, 164 S.E.2d 823 (1968); Parker v. Spurlin, 227 Ga. 183, 179 S.E.2d 251 (1971); Tingle v. Harvill, 228 Ga. 332, 185 S.E.2d 539 (1971); Davis v. Carpenter, 157 Ga. App. 875, 278 S.E.2d 758 (1981); McDaniel v. Dykes, 159 Ga. App. 514, 284 S.E.2d 30 (1981); Giordano v. Federal Land Bank, 163 Ga. App. 390, 294 S.E.2d 634 (1982); Pope v. Kem Mfg. Corp., 249 Ga. 868, 295 S.E.2d 290 (1982); Westminster Properties, Inc. v. Atlanta Assocs., 250 Ga. 841, 301 S.E.2d 636 (1983); Schwartz v. Rennie, 185 Ga. App. 638, 365 S.E.2d 159 (1988); Kienel v. Lanier, 190 Ga. App. 201, 378 S.E.2d 359 (1989); Gale v. Hayes Microcomputer Prods., Inc., 192 Ga. App. 30, 383 S.E.2d 590 (1989); Arford v. Blalock, 199 Ga. App. 434, 405 S.E.2d 698 (1991); Wilensky v. Blalock, 262 Ga. 95, 414 S.E.2d 1 (1992); Saffar v. Chrysler First Bus. Credit Corp., 215 Ga. App. 239, 450 S.E.2d 267 (1994); Ledbetter v. Ledbetter, 222 Ga. App. 858, 476 S.E.2d 626 (1996); Longino v. Bank of Ellijay, 228 Ga. App. 37, 491 S.E.2d 81 (1997); Parello v. Maio, 268 Ga. 852, 494 S.E.2d 331 (1998); Conner v. Hart, 252 Ga. App. 92, 555 S.E.2d 783 (2001); Duncan v. Moore, 275 Ga. 656, 571 S.E.2d 771 (2002); Douglas v. Bigley, 278 Ga. App. 117, 628 S.E.2d 199 (2006); Hendry v. Wells, 286 Ga. App. 774, 650 S.E.2d 338 (2007); Saye v. Unumprovident Corp., No. 1:07-CV-31-TWT, 2007 U.S. Dist. LEXIS 58901 (N.D. Ga. Aug. 9, 2007).

Confidential Relations Generally

1. In General

This section does not attempt to comprehensively enumerate the cases wherein the relation of mutual confidence is present. The showing of a relationship in fact which justifies the reposing of confidence by one party in another is all the law requires. Cochran v. Murrah, 235 Ga. 304, 219 S.E.2d 421 (1975); Vitner v. Funk, 182 Ga. App. 39, 354 S.E.2d 666 (1987).

The relationships listed as examples in this section are not exclusive, as shown by the use of the abbreviation "etc." and the phrase "where one party is so situated …" Cochran v. Murrah, 235 Ga. 304, 219 S.E.2d 421 (1975).

This section goes beyond the strict fiduciary relations of the parties to the particular circumstances of the case. Cochran v. Murrah, 235 Ga. 304, 219 S.E.2d 421 (1975).

Although some confidential relationships are created by law and contract (e.g., partners), others may be created by the facts of the particular case. Cochran v. Murrah, 235 Ga. 304, 219 S.E.2d 421 (1975).

In addition to partners and principals and agents, it has been held that confidential relationships may exist between husband and wife, brother and sister, and even banks and creditors of a depositor. Cochran v. Murrah, 235 Ga. 304, 219 S.E.2d 421 (1975).

The mere fact that one reposes trust and confidence in another does not create a confidential relationship. See Thomas v. Eason, 208 Ga. 822, 69 S.E.2d 729 (1952); Lewis v. Alderman, 117 Ga. App. 855, 162 S.E.2d 440 (1968); United States ex rel. Meva Corp. v. Northeast Constr. Co., 298 F. Supp. 1135 (S.D. Ga. 1969); Anderson Chem. Co. v. Portals Water Treatment, Inc., 768 F. Supp. 1568 (M.D. Ga. 1991), aff'd in part, rev'd in part, 971 F.2d 756 (11th Cir. 1992); Bowen v. Hunter, Maclean, Exley & Dunn, 241 Ga. App. 204, 525 S.E.2d 744 (1999); Burgess v. Coca-Cola Co., 245 Ga. App. 206, 536 S.E.2d 764 (2000).

The fact that an unlearned and unedu-

Confidential Relations
Generally (Cont'd)
1. In General (Cont'd)

cated person reposes trust and confidence in another does not create a confidential relationship. Clinton v. State Farm Mut. Auto. Ins. Co., 110 Ga. App. 417, 138 S.E.2d 687 (1964).

The mere fact that the defendant had confidence in the party with whom one contracted does not constitute a confidential relationship or a "similar relationship of mutual confidence" within the meaning of former Code 1933, § 37-707 (see O.C.G.A. § 23-2-58) so as to require the application of former Code 1933, § 37-708 (see O.C.G.A. § 23-2-59). Cole v. Cates, 113 Ga. App. 540, 149 S.E.2d 165 (1966).

No confidential relationship created. — The fact that it is alleged that a plaintiff reposed trust and confidence in the defendant does not create a confidential relationship. In the majority of business dealings opposite parties have trust and confidence in each other's integrity, but there is no confidential relationship by this alone. This state of facts does not bring the plaintiff within the protection of this section. Dover v. Burns, 186 Ga. 19, 196 S.E. 785 (1938).

Allegation that defendant was a frequent visitor in the plaintiff's home and that he had been a close personal, confidential and business adviser to the plaintiff did not establish the existence of a confidential relationship between them within the meaning of this section. Charles v. Simmons, 215 Ga. 794, 113 S.E.2d 604, cert. denied, 364 U.S. 871, 81 S. Ct. 113, 5 L. Ed. 2d 93 (1960).

Although the plaintiffs offered evidence demonstrating that defendant was their personal friend and had conducted business with them on matters not relating to investments, this evidence is not sufficient to establish a confidential relationship between the parties so as to justify the plaintiffs reposing trust in defendant. Garland v. Advance Med. Funding L.P., 86 F. Supp. 2d 1195 (N.D. Ga. 2000).

Statements made by a corporate officer and owner to investors of a mortgage company that the officer would be obligated on each and every loan and would personally manage their money and be involved with the management of the company did not create a confidential relationship; additionally, the investors had their own financial advisor. Albee v. Krasnoff, 255 Ga. App. 738, 566 S.E.2d 455 (2002).

Factual question as to whether confidential relationship existed. — Trial court did not err in denying the motion for summary judgment filed by a corporation's general counsel/vice-president because questions of fact existed regarding the existence of a confidential relationship between the general counsel/vice-president and the investors, which were for a jury to decide. Cushing v. Cohen, 323 Ga. App. 497, 746 S.E.2d 898 (2013).

Existence or reliance on relationship issue for jury. — Whether a confidential relationship existed between plaintiff and his employer's agents, and whether plaintiff justifiably relied on representations regarding group insurance coverage, were questions for the jury. Capriulo v. Bankers Life Co., 178 Ga. App. 635, 344 S.E.2d 430 (1986).

A confidential relationship is distinguished by the expectations of the parties involved, while a trade secret is identified through rigorous examination of the information sought to be protected. The jury is empowered to decide whether a confidential relationship exists under the facts of a particular case. Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441 (11th Cir. 1991).

2. Specific Relationships

Attorney-client relationship. — There was insufficient evidence to establish that the attorney for the purchaser of land was also the attorney for the sellers during the time of the transactions at issue. McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992).

Trial court erred in granting summary judgment with respect to a client's breach of fiduciary duty claim, which was not a mere duplication of the legal malpractice claim that was based on the establishment of a fiduciary, attorney-client relationship that was breached, as: (1) material fact issues remained as to whether an attorney-client relationship existed between the client and the attorney; (2) the

question of legal malpractice remained an issue; and (3) the client had the right to plead alternative theories, and the jury should be permitted to decide the breach of fiduciary duty claim should they find no attorney-client relationship existed. Both v. Frantz, 278 Ga. App. 556, 629 S.E.2d 427 (2006).

Creditors' 11 U.S.C. § 523(a)(4) claim against a Chapter 13 debtor, their attorney, was dismissed for failure to state a claim, as the creditors failed to allege a contract or other agreement establishing a technical trust, but instead cited O.C.G.A. § 23-2-58, which the court held did not establish fiduciary capacity, as the statute did not designate trust property or impose trust duties. Further, none of the Georgia Rules of Professional Conduct cited by the creditors, Ga. St. Bar R. 4-102(d):1.1, 1.3, 1.6, and 1.7(a), mentioned trust property and, thus, those rules were ineffective to establish fiduciary capacity for purposes of 11 U.S.C. § 523(a)(4). Crisler v. Farr (In re Farr), No. 11-1009, 2011 Bankr. LEXIS 1875 (Bankr. M.D. Ga. May 18, 2011).

Attorney breached fiduciary duties to a bankruptcy debtor since the debtor's reliance on the attorney as a family attorney and the attorney's controlling influence over the debtor established an attorney-client relationship with regard to a real property transaction, and the attorney induced the debtor to execute documents which were not in the debtor's best interests and instead benefitted the attorney and other parties. Boudreaux v. Holloway (In re Holloway), No. 10-03015, 2015 Bankr. LEXIS 1040 (Bankr. S.D. Ga. Mar. 31, 2015), aff'd, 2017 U.S. App. LEXIS 3359 (11th Cir. Ga. 2017).

Accountant and client. — When a company sued its accountants for breach of fiduciary duty regarding a sale of the company's assets, summary judgment was properly granted in favor of the accountants because the evidence was insufficient to create a factual dispute as to whether the accountants exercised a controlling influence over the will, conduct, and interest of the company, as required under O.C.G.A. § 23-2-58 for a fiduciary relationship to arise. R.W. Holdco, Inc. v. Johnson, 267 Ga. App. 859, 601 S.E.2d 177 (2004).

Bank and its customers. — There is no confidential relationship between a bank and its customers merely because the customer had advised with, relied upon, and trusted the bankers in the past. Pardue v. Bankers First Fed. Sav. & Loan Ass'n, 175 Ga. App. 814, 334 S.E.2d 926 (1985); Russell v. Barnett Banks, Inc., 241 Ga. App. 672, 527 S.E.2d 25 (1999).

The trial court correctly determined that there was no evidence of special circumstances imposing upon the bank the duties of a fiduciary in favor of borrowing petroleum companies such that summary judgment as to any claim for breach of fiduciary duty was correct. Russell Corp. v. BancBoston Fin. Co., 209 Ga. App. 660, 434 S.E.2d 716 (1993).

Trial court did not err in granting judgment on the pleadings to a bank as to a customer's claim for breach of a duty of confidentiality because the customer failed to assert in the complaint facts showing that the bank owed the customer a confidential duty or invaded the customer's privacy, and the customer did not plead any special circumstances showing that the customer had a particular relationship of trust or mutual confidence with the bank; the bank-customer relationship is not confidential. Jenkins v. Wachovia Bank, N.A., 314 Ga. App. 257, 724 S.E.2d 1 (2012).

Businessmen. — In the majority of business dealings, opposite parties have trust and confidence in each other's integrity, but there is no confidential relationship by this alone. Lewis v. Alderman, 117 Ga. App. 855, 162 S.E.2d 440 (1968).

A confidential relationship may exist between businessmen, depending on the facts. Cochran v. Murrah, 235 Ga. 304, 219 S.E.2d 421 (1975).

The entire business structure of the parties, their interactions and dealings over the course of several years, and their common goal all furnished a basis for a jury to find a relationship in fact which justified the reposal of confidence on the part of one party and good faith on the part of the others. Vitner v. Funk, 182 Ga. App. 39, 354 S.E.2d 666 (1987).

Facts would not support finding a confidential relationship between real estate developers and a supermarket regarding

Confidential Relations
Generally (Cont'd)
2. Specific Relationships (Cont'd)

their shared goal of finding a site and constructing a shopping center in which the supermarket would lease space, where the parties fought over the terms of the lease agreement for approximately six months. Doll v. Grand Union Co., 925 F.2d 1363 (11th Cir. 1991).

Relationship between the parties, close and lengthy as it might have been, was merely a business relationship between two independent concerns; therefore, no fiduciary duties were created. Automated Solutions Enters. v. Clearview Software, Inc., 255 Ga. App. 884, 567 S.E.2d 335 (2002).

Parties' merger agreement and post-merger relationship did not establish a confidential or fiduciary relationship between the parties since the plaintiff did not exercise sole and exclusive control over the termination of a lease held by the defendant; also, the mere fact that the plaintiff's signature was required on instructions to the escrow agent for the release of escrow funds did not establish a confidential relationship. Interland, Inc. v. Bunting, No. 1:04-CV-444-ODE, 2005 U.S. Dist. LEXIS 36112 (N.D. Ga. Mar. 31, 2005).

Evidence that an appellant breached an agreement with the appellee; was unjustly enriched by keeping the profits of the parties' business during the months the appellee was entitled to operate it; and committed civil conspiracy when, in concert with the parties' lessor, prevented the appellee from operating the business, supported an award of lost profit damages to the appellee. Asgharneya v. Hadavi, 298 Ga. App. 693, 680 S.E.2d 866 (2009), overruled on other grounds, Jordan v. Moses, 291 Ga. 39, 727 S.E.2d 460 (2012).

Genuine issues of fact existed as to whether fiduciary duty owed between business people. — Trial court erred by granting summary judgment to the defendants on the part owner's claim for breach of contract because there were genuine questions of fact regarding whether the defendants owed the part owner a fiduciary duty, whether the defendants breached the duty, and whether any breach proximately caused the part owner damage. Bedsole v. Action Outdoor Adver. JV, LLC, 325 Ga. App. 194, 750 S.E.2d 445 (2013).

Business relationship. — Trial court erred by denying summary judgment to a subcontractor on the contractor's breach of fiduciary claim because the evidence did not raise an issue of fact regarding the existence of a special agency or any other confidential relationship between the parties as the business relationship was an arms-length one and even adversarial. UWork.com, Inc. v. Paragon Techs., Inc., 321 Ga. App. 584, 740 S.E.2d 887 (2013).

Members of a partnership or an LLC undoubtedly shared a special relationship under Georgia law, but the fiduciary relationship addressed in the Bankruptcy Code exception to discharge had to be demonstrated by evidence of an express trust. Keys v. Allen (In re Allen), No. G11-24718-REB, 2013 Bankr. LEXIS 5084 (Bankr. N.D. Ga. Oct. 25, 2013).

Managing and non-managing members of LLC. — In a suit arising out of the winding up of an LLC, neither res judicata nor collateral estoppel barred the non-managing member's breach of contract and fiduciary duty counterclaims involving the sale of the LLC property based on a prior suit between the same parties because the current claims related to conduct occurring after the first trial. Eichenblatt v. Piedmont/Maple, LLC, 341 Ga. App. 761, 801 S.E.2d 616 (2017).

Manager of joint venture. — Trial court did not err in denying a manager's motion for summary judgment as to the joint venturers' counterclaim for breach of fiduciary duty because questions of fact existed regarding whether the manager exercised good faith by depleting the business funds and suspending distributions. Maree v. ROMAR Joint Venture, 329 Ga. App. 282, 763 S.E.2d 899 (2014), overruled on other grounds by SRM Group, Inc. v. Travelers Prop. Cas. Co. of Am., 308 Ga. 404, 841 S.E.2d 729 (2020).

Clergyman and parishioner. — It can be found that a clergyman occupies a confidential relationship toward a member of his church. Bryan v. Norton, 245 Ga. 347, 265 S.E.2d 282 (1980).

Whether a wife consented to the sexual relationship would be irrelevant when the bishop was, by virtue of the bishop's confidential relationship, in a position to manipulate the wife into giving that consent by not only being a bishop but also the wife's employer. Brewer v. Paulk, 296 Ga. App. 26, 673 S.E.2d 545 (2009).

Employer and employee. — Employee and employer is not the type of relationship such as that of principal and agent from which the law will necessarily imply confidentiality. Cochran v. Murrah, 235 Ga. 304, 219 S.E.2d 421 (1975).

Even though generally the relationship between an employer and employee is that of arms length bargaining, this is not to say, however, that under a particular fact situation a confidential relationship can never exist between an employer and his employee (e.g., an employer signing checks prepared by his secretary-bookkeeper). Cochran v. Murrah, 235 Ga. 304, 219 S.E.2d 421 (1975).

When assurances between a real estate broker and his former real estate director, an at-will employee, would not have been made but for the prior employer-employee relationship, and because they were not made while the relationship existed, the assurances did not cause the employer and employee relationship to evolve into a fiduciary relationship. Atlanta Mkt. Ctr. Mgt. Co. v. McLane, 269 Ga. 604, 503 S.E.2d 278 (1998).

When there was no evidence showing that employees could create obligations on behalf of their employer or bring third parties into contractual relations with it, they were not agents owing a fiduciary duty to the employer. Physician Specialists in Anesthesia, P.C. v. Wildmon, 238 Ga. App. 730, 521 S.E.2d 358 (1999).

Evidence that a former executive officer of a product development company, while still employed, pursued opportunities in the same market for the officer's own benefit, to the company's detriment, and appropriated a presentation and its information, showed a triable issue as to a confidential relationship under O.C.G.A. § 23-2-58. Glades Pharms., LLC v. Murphy, No. 1:04-CV-3817-TWT, 2005 U.S. Dist. LEXIS 36198 (N.D. Ga. Dec. 16, 2005).

There is little question that a former employee's relationship with the employer was one which required confidence under O.C.G.A. § 23-2-58. The undisputed evidence showed that the employee was intimately involved in the negotiations leading up to and the continuous administration of the contracts with a contractor; not only was the employee responsible for bringing the contractor to the employer, the employee was charged with supervision and inspection of the contractor's contract work. GIW Indus. v. JerPeg Contr., Inc., 530 F. Supp. 2d 1323 (S.D. Ga. 2008).

On a breach of fiduciary duty claim against a former employee concerning the employee's alleged solicitation of the employee's co-workers, the trial court did not err in granting summary judgment in favor of the employee because, even assuming that the employee had the authority to bind the employer with respect to customer contracts, there was no evidence that the employee had the authority to bind the company on employment matters or relations. Thus, although the employee may have owed the company a fiduciary duty with respect to the customer contracts the employee entered into on its behalf, there was no evidence that the employee occupied a similar confidential relationship with respect to employee relations. Gordon Document Prods. v. Serv. Techs., 308 Ga. App. 445, 708 S.E.2d 48 (2011).

Trial court properly denied a personal assistant's motion for a directed verdict on a couple's claim for breach of fiduciary duty based upon the assistant's withdrawal of $49,000 remaining in a joint account held with the wife because there was evidence that the assistant was not entitled to any portion of that account since the assistant was a fiduciary only. Lee v. Choi, 323 Ga. App. 370, 744 S.E.2d 871 (2013).

Because the employer failed to point out specific evidence giving rise to a triable issue as to the former employee's status as an agent owing a fiduciary duty to the principal, the employer failed to show error in the trial court's grant of summary judgment to the employee on the employer's claim for breach of fiduciary duty.

Confidential Relations
Generally (Cont'd)
2. Specific Relationships (Cont'd)

Avion Sys. v. Bellomo, 338 Ga. App. 141, 789 S.E.2d 374 (2016).

Evidence was insufficient to convict the defendant of criminal attempt to commit theft by taking by a fiduciary as the relationship between the defendant and the employer was merely that of employer-employee because, although the defendant was responsible for creating invoices, the defendant did not have authority to act for the employer beyond weighing the metals and assigning to the weight a dollar amount that had been previously fixed by the employer; and the defendant could not negotiate with the customers or independently determine how much the metals were worth; thus, although the conviction for criminal attempt to commit theft by taking stood, the felony sentence, based on the defendant being a fiduciary, was reversed. Scott v. State, 344 Ga. App. 412, 810 S.E.2d 613 (2018).

Employee benefit plan claims administrator and utilization review provider. — No fiduciary duty existed between a participant in an employee benefit health plan and the claims administrator for the plan or an independent plan medical utilization review provider; therefore, the participant could not assert a claim for breach of fiduciary duty against the claims administrator or the review provider. Monroe v. Bd. of Regents of the Univ. Sys., 268 Ga. App. 659, 602 S.E.2d 219 (2004).

Executor and legatee. — The relation between an executor and the devisees under a will is to a certain extent a relation of confidence and trust. Dorsey v. Green, 202 Ga. 655, 44 S.E.2d 377 (1947), later appeal, 204 Ga. 436, 49 S.E.2d 901 (1948).

The policy of the law forbids that administrators, executors, or trustees, having duties to perform in reference to property for their cestuis que trust, should deal with the beneficiaries with respect thereto, except upon the footing of the utmost candor and upon considerations demonstrative of the absence of any undue advantage. Dorsey v. Green, 202 Ga. 655, 44 S.E.2d 377 (1947), later appeal, 204 Ga. 436, 49 S.E.2d 901 (1948).

An executor cannot purchase property from himself, directly or indirectly, and if he does so the sale will be set aside at the instance of a legatee who is not in laches, however fair and honest it may have been. He may, however, purchase the property from a legatee who is sui juris and laboring under no disability, where all the circumstances of the transaction are fair and open, and no advantage is taken by him of the legatee by concealment, misrepresentation, or omission to state any important fact, or by the exercise or undue influence, and the legatee understands the nature and effect of his act. Dorsey v. Green, 202 Ga. 655, 44 S.E.2d 377 (1947), later appeal, 204 Ga. 436, 49 S.E.2d 901 (1948).

A court of equity looks upon the purchase of estate property by the executor from a legatee with jealous eye, and will not uphold it, unless it appears that the sale is fair, and that there is no fraud, no concealment, and no advantage taken by the executor of information acquired by him in his character as such. Dorsey v. Green, 202 Ga. 655, 44 S.E.2d 377 (1947), later appeal, 204 Ga. 436, 49 S.E.2d 901 (1948).

Business did not have a confidential relationship with a corporation where the parties had similar but separate business objectives that did not merge into a common business objective; the business's insistence on status as a platform company was inconsistent with a confidential relationship because a bid prepared by the business with another company was not evidence of such a relationship, even though the corporation's president was an officer in the other company, as there was no showing that the corporate entities should be disregarded. Infrasource, Inc. v. Hahn Yalena Corp., 272 Ga. App. 703, 613 S.E.2d 144 (2005).

Trial court properly denied the motions for a directed verdict and for a judgment notwithstanding the verdict filed by the executors of a will and trust because there was sufficient evidence to support the jury's finding that the documents were invalid as a product of undue influence based on the executors taking complete

control of the elderly testator and isolating the testator from the testator's sons, as well as substituting the executors' desires and having the testator sign a new will and trust, which benefitted the executors and excluded the testator's wife and sons. Davison v. Hines, 291 Ga. 434, 729 S.E.2d 330 (2012).

Friendship. — That the defendant was or had been a friend of the plaintiff would not alone create a relation of trust or confidence between them. Norris v. Hart, 74 Ga. App. 444, 40 S.E.2d 96 (1946).

Evidence was sufficient to support a jury's finding that there was a confidential relationship pursuant to O.C.G.A. § 23-2-58 between an attorney, who was dying of leukemia, and the attorney's former client and friend, from whom the attorney sought to borrow money on the attorney's life insurance policy. Stamps v. JFB Props., LLC, 287 Ga. 124, 694 S.E.2d 649 (2010).

Lender's claims against borrowers for discharge of documents the lender signed without reading, which discharged a $1.2 million note and released the lender's security interest in the borrowers' property, were subject to summary judgment. The lender's close, personal friendship with the borrowers did not create a confidential relationship under O.C.G.A. § 23-2-58 and did not excuse the lender's failure to read the documents. Arko v. Cirou, 305 Ga. App. 790, 700 S.E.2d 604 (2010).

Boyfriend and girlfriend. — The trial court did not err in denying a boyfriend a directed verdict on a fraud in the inducement claim asserted by the boyfriend's girlfriend, given evidence of the personal nature of their relationship which caused the girlfriend to place trust and confidence in the boyfriend's repeated promises of marriage and believe that the boyfriend was acting in the girlfriend's best interest by taking the monies loaned to use for a business, which would ultimately allow the boyfriend to repay the girlfriend and support them after they were married. Tankersley v. Barker, 286 Ga. App. 788, 651 S.E.2d 435 (2007), cert. denied, No. S07C1821, 2007 Ga. LEXIS 742 (Ga. 2007).

Husband and wife. — It is plain that under Georgia law a confidential relationship exists between husband and wife. ITT Com. Fin. Corp. v. Dilkes (In re Analytical Sys.), 113 Bankr. 91 (N.D. Ga. 1990), rev'd on other grounds, 933 F.2d 939 (11th Cir. 1991).

Wife's personal injury action against her husband arising from the husband's infection of the wife with genital herpes was not barred by statute of limitations; the parties enjoyed a confidential relationship pursuant to O.C.G.A. § 23-2-58, and thus, the wife was entitled to repose confidence and trust in the husband, and because the husband failed to admit the truth to the wife, he was guilty of a false representation and that falsehood deterred the wife from instituting suit and tolled the statute of limitation. Beller v. Tilbrook, 275 Ga. 762, 571 S.E.2d 735 (2002).

Wife could not claim that she had a confidential relationship with her husband when she signed a prenuptial agreement, thereby relieving the wife of any obligation to verify the agreement's representations, because when the wife signed the agreement they were not married, so the confidential relationship applicable to husbands and wives did not exist and, under Georgia law, there was no such relationship applicable to putative spouses. Mallen v. Mallen, 280 Ga. 43, 622 S.E.2d 812 (2005).

Husband, his father, and the father's friend were not entitled to summary judgment in an action by the Securities Exchange Commission against them for insider trading under 17 C.F.R. § 240.10b-5 because a reasonable factfinder could conclude that the husband violated a fiduciary duty to his wife under O.C.G.A. § 23-2-58 by disclosing information about the wife's employer, leading to his father and the friend purchasing stock options in the wife's employer on the basis of material, non-public information. United States SEC v. Goodson, No. 1:99-cv-2133-MHS, 2001 U.S. Dist. LEXIS 26493 (N.D. Ga. Mar. 6, 2001).

After the husband engaged counsel to draw up a formal post-nuptial agreement, and the husband moved to enforce the agreement when the wife filed for divorce, the post-nuptial agreement was unenforceable as the wife testified that the wife

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signed the agreement because the husband represented to the wife that, if the wife signed the agreement, the husband would understand that the wife loved the husband, and the husband would tear up the agreement; the husband procured the wife's signature on the agreement under the pretense that the agreement would never be enforced and, in fact, that the agreement would be destroyed, and the evidence was sufficient to establish the existence of fraud in procuring the agreement. Murray v. Murray, 299 Ga. 703, 791 S.E.2d 816 (2016).

Paramours. — As to a breach of fiduciary duty claim in a defamation suit, one of the defendants, by virtue merely of the status as a paramour of the plaintiff, owed no fiduciary duty to the plaintiff and, thus, the breach of fiduciary claim failed. Bickerstaff v. SunTrust Bank, 299 Ga. 459, 788 S.E.2d 787 (2016), cert. denied, 137 S. Ct. 571, 196 L. Ed. 2d 447 (U.S. 2016).

Insurance agent and non-insured. — Summary judgment was properly awarded the insurer with respect to a fraud claim where the record was devoid of any evidence from which to conclude that a confidential relationship existed between insurance agent and plaintiff who was neither a party to the insurance contract, a named insured, nor an owner of the vehicle. Clark v. Superior Ins. Co., 209 Ga. App. 290, 433 S.E.2d 394 (1993).

Insurance agent and insured. — When an insured sued an insurance agent for fraud and breach of fiduciary duty because the agent allegedly misrepresented the coverage afforded by a policy the insured purchased through the agent, the insured did not show the presence of a confidential relationship with the agent which would have negated the insured's duty to read the policy the insured purchased because: (1) the insured knew what kind of insurance coverage the insured wanted when approaching the agent, so the insured did not rely on the agent's expertise to obtain the correct insurance; and (2) the insured's past dealings with and trust in the agent did not create a confidential relationship. Canales v. Wilson Southland Ins. Agency, 261 Ga. App. 529, 583 S.E.2d 203 (2003).

Wife and agent. — Defendant, as decedent's wife and agent under the power of attorney, enjoyed a relationship with decedent which was both confidential and fiduciary in nature. Wheeless v. Gelzer, 780 F. Supp. 1373 (N.D. Ga. 1991).

Lender and borrower. — There is no confidential relationship between lender and borrower for they are creditor and debtor with clearly opposite interests. Pardue v. Bankers First Fed. Sav. & Loan Ass'n, 175 Ga. App. 814, 334 S.E.2d 926 (1985).

Mortgagee and mortgagor. — There is no confidential relationship between mortgagee and mortgagor for they are creditor and debtor with clearly opposite interests. Pardue v. Bankers First Fed. Sav. & Loan Ass'n, 175 Ga. App. 814, 334 S.E.2d 926 (1985).

Mortgage companies were not liable for a breach of fiduciary duty to real estate investors whose credit scores allegedly were injured after the companies' failure to timely pay a tax bill triggered the filing of a county tax lien and after they erroneously reported having foreclosed a mortgage granted to the investors because the investors failed to show the existence of a confidential relationship between the parties within the meaning of O.C.G.A. § 23-2-58. Burch v. Chase Manhattan Mortg. Corp., No. 1:07-CV-0121-JOF, 2008 U.S. Dist. LEXIS 76595 (N.D. Ga. Sept. 15, 2008).

Homeowner sufficiently alleged a claim for breach of contract against the homeowner's mortgage lender based on a promise in the security agreement that the lender would foreclose "fairly" while acting as the owner's agent; the homeowner was not required to perform the homeowner's obligation of payment because the lender's obligations as to reinstatement and foreclosure were triggered by the failure to pay. Stewart v. SunTrust Mortg., Inc., 331 Ga. App. 635, 770 S.E.2d 892 (2015).

Hospital and patient. — In an action between a group of uninsured patients and a non-profit hospital in which the

patients alleged, among other things, a breach of fiduciary duty, absent authority recognizing a fiduciary relationship between a hospital and a patient with respect to the prices the hospital charged, said claim was properly dismissed. Cox v. Athens Reg'l Med. Ctr., Inc., 279 Ga. App. 586, 631 S.E.2d 792 (2006).

Hospital and doctors. — In a suit by doctors against a hospital where they had served as anesthesiologists alleging that the hospital's failure to rehire the doctors was motivated by malice, summary judgment to the hospital was proper based on peer review immunity under O.C.G.A. § 31-7-132(a); the doctors' claim for breach of fiduciary duty failed because the relationship between the doctors and the hospital was governed by a contract and no fiduciary relationship was shown. Cancel v. Medical Center of Central Ga., Inc., 345 Ga. App. 215, 812 S.E.2d 592 (2018), cert. denied, No. S18C1054, 2018 Ga. LEXIS 769 (Ga. 2018).

Partners. — Partners stand in a confidential relationship to each other. Crosby v. Rogers, 197 Ga. 616, 30 S.E.2d 248 (1944).

Petitioner was justified in failing to read deed which he signed or to examine the records, and in relying upon the defendant, because of the confidential relationship existing between them as partners, and where suit was brought promptly upon learning of the defendant's breach of faith the petitioner was not estopped by laches although 14 years had passed since the deed attacked was executed. Crosby v. Rogers, 197 Ga. 616, 30 S.E.2d 248 (1944).

Under the evidence as to the existence of a partnership between the petitioner and the defendant and their agreement to jointly purchase the land involved, and evidence that the petitioner paid one-half of the purchase money and trusted the defendant to close the deal and obtain a conveyance naming them both as grantees, the defendant could not obtain an interest in the land antagonistic to that of the petitioner; and where the defendant procured a deed, in his own name only, equity would annul the conveyance and decree title in the petitioner to his share. Crosby v. Rogers, 197 Ga. 616, 30 S.E.2d 248 (1944).

Summary judgment was not appropriate for a guaranty partner's allegations that an investment bank partner, which was also a creditor of the partnership, breached its fiduciary duty towards the guaranty partner by using coercive and deceptive tactics in its efforts to restructure the partnership because a jury question existed as to whether the investment bank partner breached its fiduciary duty owed to the guaranty partner. AAF-McQuay, Inc. v. Willis, 308 Ga. App. 203, 707 S.E.2d 508 (2011).

Court of appeals erred in granting an attorney's motion for summary judgment in the court's action to dissolve a partnership because the court cited disapproved language that the tort of wrongful dissolution of a partnership required the attempt to appropriate the "new prosperity" of the partnership; the gravamen of a wrongful dissolution claim is a partner's attempt to appropriate, through the dissolution, the assets or business of the partnership, which may include prospective business, without adequate compensation to the remaining partners. Jordan v. Moses, 291 Ga. 39, 727 S.E.2d 460 (2012).

Franchisor and franchisee. — A franchise contract did not create a confidential relationship between the franchisor and franchisee. Allen v. Hub Cap Heaven, Inc., 225 Ga. App. 533, 484 S.E.2d 259 (1997).

Principal and agent. — Since the relation of principal and agent was established when the owner, listed her property for sale with the realty company, such being a confidential or fiduciary relation, it imposed on the agent the duty of exercising the utmost good faith and loyalty toward the principal. It became the duty of the agent to act primarily and solely for the benefit of the principal in all matters connected with the agency. Dolvin Realty Co. v. Holley, 203 Ga. 618, 48 S.E.2d 109 (1948).

The relationship of principal and agent is fiduciary in character, and imposes upon the parties the duties of exercising toward each other the utmost good faith. Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

The law implies as a part of the contract by which every agency arises that the

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agent agrees to have and exercise for and toward his principal loyalty and absolute good faith, and any breach of this implied contract on his part forfeits his right to commissions. Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

The relationship of principal and agent, being confidential and fiduciary in character, demands of the agent the utmost loyalty and good faith to his principal. Any breach of this good faith whereby the principal suffers any disadvantage and the agent reaps any benefit is a fraud of such nature as to preclude the agent from taking or retaining the benefit. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214 (1958).

The law implies, as a part of the contract by which every agency arises, that the agent agrees to have and exercise towards his principal diligence, loyalty and absolute good faith. Anderson v. Redwal Music Co., 122 Ga. App. 247, 176 S.E.2d 645 (1970).

Real estate and brokers and clients. — Whatever may be the reciprocal duties imposed by law on a real estate broker and his principal, the relationship is one of mutual confidence, and the law requires that the broker, in the discharge of his duties, act towards his principal in the utmost good faith. Lyle v. Etheridge, 40 Ga. App. 808, 151 S.E. 531 (1930).

Although a real estate broker, when obtaining for the owner of real estate a tenant for the property, is under no duty, arising out of the relationship to his principal, to guarantee the financial standing of the lessee and the lessee's ability to perform the proposed lease contract, yet where the broker makes a knowingly false representation to his principal, the owner of the property, as to the financial standing of the lessee and the lessee's ability to perform the proposed lease contract, and thereby induces the principal to accept the tenant procured by the broker and to pay to the broker a commission for his services in procuring the tenant, he thereby perpetrates a fraud upon his principal, for which the principal, in a suit against the broker, may recover for the damages sustained. Lyle v. Etheridge, 40 Ga. App. 808, 151 S.E. 531 (1930).

Gifts and purchases of agents scrutinized. — It is for the common security of mankind "that gifts procured by agents, and purchases made by them, from their principal, should be scrutinized with a close and vigilant suspicion." Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214 (1958).

Real estate brokers and clients. — Answer, alleging that the plaintiff broker misrepresented the financial ability of the buyer, that is, that the buyer was ready, willing and able to buy on the terms stipulated by the seller, thereby inducing the defendant to accept the buyer's offer and to enter into a contract which the buyer was unable to perform, set out a breach of the broker's duty of exercising the utmost good faith toward his principal, the seller, which was a defense to the broker's action for commissions. Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

If the agent practices upon the principal any deception (whether intentional or not) whereby the principal is misled and damaged and the agent would reap any benefit, the transaction is fraudulent, and the courts will not allow the agent to take or retain the benefit. Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

Because of fiduciary relationship, the petitioner was justified in relying upon the representations of her agent and in failing to read and know the contents of the various deeds signed by her. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214 (1958).

When the fiduciary relationship of principal and agent existed between the petitioner and the defendant, the latter could not make advantage or profit for the agent out of the relationship to the injury of one's principal. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214 (1958).

The mere fact that one of the two parties to a contract of sale between them is known to the other to be a real estate broker, when the broker is not acting as the agent for the buyer but is himself the seller of the property, will fail to show a fiduciary relationship. Lewis v. Alderman,

117 Ga. App. 855, 162 S.E.2d 440 (1968).

Fiduciary relationship in insurance transaction. — Should the jury find that an agency relationship existed between an insurance agent and an insurance applicant, the jury would be required further to treat that relationship as a fiduciary relationship. Stewart v. Boykin, 165 Ga. App. 868, 303 S.E.2d 50 (1983).

An agent can do nothing more disloyal to his principal than contacting his principal's employer and taking over the latter's position with the company. Koch v. Cochran, 251 Ga. 559, 307 S.E.2d 918 (1983).

One of the areas where the law finds a confidential or fiduciary relationship is in the case of principal and agent. Tigner v. Shearson-Lehman Hutton, Inc., 201 Ga. App. 713, 411 S.E.2d 800 (1991).

Fiduciary relationship was created between a brokerage firm and a mentally disabled client, after the firm exercised a "controlling influence" over the client and had accepted one's account with the understanding that one needed complete guidance in the management and handling of one's money. Tigner v. Shearson-Lehman Hutton, Inc., 201 Ga. App. 713, 411 S.E.2d 800 (1991).

When the cotenant was a relative to the other heirs and acted as agent for the purchaser of land during the sale, the agent's confidential relationship with the other heirs was imputed to the purchaser; and a jury could find that the purchaser, through the agent's confidential relationship with the other heirs, was so situated as to exercise a controlling influence over the will, conduct, and interest of the other heirs. McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992).

Inquiry of manufacturer's customers whether, in the event representative (agent) left the appellant's employment in the future, they would consider continuing to place their orders through him did not result in profit at manufacturer's expense during his actual employment. Nilan's Alley, Inc. v. Ginsburg, 208 Ga. App. 145, 430 S.E.2d 368 (1993).

In a breach of fiduciary duty and fraud action wherein an investment company obtained a jury verdict in the company's favor against a site manager, the manager's spouse, and others, the trial evidence supported the conclusion that a fiduciary relationship arose between the site manager and the investment company as the investment company entrusted significant financial responsibility and authority to the site manager, who engaged in a financial kickback scheme diverting thousands of dollars from the investment company. Wright v. Apt. Inv. & Mgmt. Co., 315 Ga. App. 587, 726 S.E.2d 779 (2012).

An agent cannot place himself in a position in which his duty and interest conflict with that of his principal, or be permitted to make a secret profit out of his agency. Franco v. Stein Steel & Supply Co., 227 Ga. 92, 179 S.E.2d 88 (1970).

Insurance agent and insured. — A confidential relationship did not exist between an insured and his agent which would have enabled the insured to place trust and reliance on oral representations by the agent, inconsistent with the terms of the form. The mere fact that one reposes trust and confidence in another does not create a confidential relationship. Trulove v. Woodmen of World Life Ins. Soc'y, 204 Ga. App. 362, 419 S.E.2d 324 (1992).

Purchaser of automobile and financer. — Purchaser of automobile has no confidential relationship with the financer of the purchase. Doxie v. Ford Motor Credit Co., 603 F. Supp. 624 (S.D. Ga. 1984).

Relatives. — A confidential relationship does not exist because of brother and sister-in-law relationship, or because of past dealings and trust and confidence reposed in brother-in-law by sister-in-law and her husband, defendant's brother. Dixon v. Dixon, 211 Ga. 557, 87 S.E.2d 369 (1955).

While the fact that the plaintiff and the decedent were brother and sister would not of itself create a confidential or fiduciary relationship between them solely because they were so related, plaintiff's allegations were sufficient to charge the existence of a confidential relationship between them requiring the utmost good faith and fair dealings on his part. Sutton v. McMillan, 213 Ga. 90, 97 S.E.2d 139 (1957).

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The fact that the plaintiff and the defendant are brothers does not of itself create a confidential or fiduciary relation between them. If such relation exists between brothers, it must be shown by proof, and the burden is upon the party asserting the existence of such relationship to affirmatively show the relationship. Hancock v. Hancock, 223 Ga. 481, 156 S.E.2d 354 (1967).

The facts that the bank officer was the brother of plaintiff's daughter-in-law, solicited plaintiff and induced him to place his business with the bank, promised to keep his affairs confidential, and to treat plaintiff right, are insufficient to create a confidential relationship. First Am. Bank v. Bishop, 244 Ga. 317, 260 S.E.2d 49 (1979).

Parent and child. — In a wrongful death case, the surviving spouse acts as the children's representative and owes them the duty to act prudently in asserting, prosecuting and settling the claim and to act in the utmost good faith. Home Ins. Co. v. Wynn, 229 Ga. App. 220, 493 S.E.2d 622 (1997).

Jury question was presented as to whether two trustees of their children's trusts acted against the interests of the beneficiaries (their children) in bad faith by amending a partnership agreement to concentrate all voting power in themselves to the exclusion of the beneficiaries, who otherwise would have become partners when they turned 45. Likewise, the trustees as partners owed duties to the trusts as partners in the partnership. Rollins v. Rollins, 338 Ga. App. 308, 790 S.E.2d 157 (2016).

Vendor and vendee. — Under the facts no confidential relationship was shown between wholesale vendor of liquor and purchaser who claimed that vendor had misrepresented the tax status of the liquors purchased. Bernstein v. Peters, 69 Ga. App. 525, 26 S.E.2d 192 (1943).

In a suit by vendor against purchaser for reformation of a deed to land to show reservation of timber, where neither fraud nor the existence of a confidential relationship was alleged or proved, it was reversible error to charge that, if the jury found that the vendor relied on the representations of the purchaser as being true due to a confidential or fiduciary relationship between the parties, and if the vendor was ignorant of the fact that reservation should have been inserted in the deed, purchaser would be guilty of fraud, and that equity will reform instrument when there was ignorance or mistake on one side and fraud or inequitable conduct on the other. Cochran v. Kendall, 210 Ga. 336, 80 S.E.2d 273 (1954).

The vendor and vendee of property are not, by virtue of such fact, placed in a confidential relationship to each other, but on the contrary are presumed to be dealing at arm's length. Lewis v. Alderman, 117 Ga. App. 855, 162 S.E.2d 440 (1968).

Buyer and seller. — Directed verdict for the seller on the buyers' breach of confidential relationship claim was reversed because there was a fact issue as to whether the seller exercised a controlling influence over the buyers in their application for mobile home permit such that the buyers were kept from discovering zoning for the property or that the seller had an increased duty to disclose the zoning. Howard v. Barron, 272 Ga. App. 360, 612 S.E.2d 569 (2005).

Tenants in common. — Purchaser of land had no duty to disclose its knowledge of a kaolin deposit to seller by virtue of its relationship as a tenant in common, since the confidential relationship between cotenants does not extend to encompass the circumstance of one tenant purchasing another cotenant's interest. McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992).

Purchaser of property and real estate investing company. — Since plaintiff's decision to buy property was based on plaintiff's confidence that it could be used in the way defendant suggested and that defendant would rent the property on plaintiff's behalf as defendant agreed to do, a jury issue existed regarding whether the parties were in a confidential relationship at the time of the alleged fraud. Yarbrough v. Kirkland, 249 Ga. App. 523, 548 S.E.2d 670 (2001).

Resident. — Trial court did not err in granting a homeowners' association sum-

mary judgment on a resident's claim of breach of fiduciary duty because the resident's mere reliance upon status as a resident of the development, without more, failed to establish a fiduciary or confidential relationship. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543 (2011).

Mining leases. — Royalty leases for the mining of kaolin were not shown to have been intended to place the parties in a confidential relationship, and the presumption remained that the agreements were entered at arm's length between persons on equal footing. Manning v. Engelhard Corp., 929 F. Supp. 1508 (M.D. Ga. 1996), aff'd, 111 F.3d 897 (11th Cir. 1997).

Investors and bank. — Breach of fiduciary duty action filed by two investors against a bank was dismissed by summary judgment because, according to the terms of an investment agreement, there was no such relationship between the parties; further, there was no evidence that the bank exercised a controlling influence over the investors' will, conduct, or interests nor did the investors establish that they relied upon the bank to make decisions on their behalf. Newitt v. First Union Nat'l Bank, 270 Ga. App. 538, 607 S.E.2d 188 (2004).

Creditors failed to prove the existence of a technical trust, either by contract or by O.C.G.A. §§ 14-11-301(1), 14-11-305(1), or 23-2-58, and, as a consequence, could not prove a fiduciary defalcation by the debtors. Thus, any debt arising from the debtors' management of a limited liability company was dischargeable under 11 U.S.C. § 523(a)(4). Tarpon Point, LLC v. Wheelus (In re Wheelus), No. 07-30114-JDW, 2008 Bankr. LEXIS 348 (Bankr. M.D. Ga. Feb. 11, 2008).

Evidence of breach by trustee shown to survive summary judgment. — In a trustee's suit against a company and the company's manager for interfering with trust assets, the trial court erred by granting summary judgment to the company and the company's manager on the trustee's breach of fiduciary claim because the evidence showed that they unilaterally transferred the trust's property interest and, although the transfer was deemed invalid, the trust's interest was invaded, creating a jury question as to injury and resulting damage, either actual or nominal. Schinazi v. Eden, 338 Ga. App. 793, 792 S.E.2d 94 (2016).

Stockbroker and stockholder. — In response to a certified question asking whether, under Georgia law, a brokerage firm owed a fiduciary duty to the holder of a non-discretionary account, the supreme court answered that the fiduciary duties owed by a broker to a customer with a non-discretionary account were not restricted to the actual execution of transactions; the broker will generally have a heightened duty, even to the holder of a non-discretionary account, when recommending an investment which the holder has previously rejected or as to which the broker has a conflict of interest. Holmes v. Grubman, 286 Ga. 636, 691 S.E.2d 196 (2010).

Presumption of Undue Influence

Evidence of confidential relationship raises presumption of undue influences. — While a mere allegation of weakness of mind not amounting to imbecility is not sufficient to set forth a cause of action for cancellation of a deed, there being no allegation of fraud or undue influence, nevertheless, where the mental weakness is pronounced, such as would prevent the grantor from understanding the nature of his act at the time the deed was executed and especially where as alleged such mental impairment is united with alleged undue and controlling influence on the part of one occupying a confidential relationship with the illiterate grantor, it will authorize a cancellation on the ground of fraud. Mullins v. Barrett, 204 Ga. 11, 48 S.E.2d 842 (1948).

When the evidence and the pleadings show that the deceased was an infirm and aged woman, suffering from a brain tumor, whose mental and physical condition declined during the last years of her life, weakened by the damage to her brain by the illness from which she died, and that the defendants stood in a confidential and fiduciary capacity to her, whereby they administered her medicines to her and cared for her in her illness, took care of

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her personal business, hired nurses for her, cared for her in their home, and she changed her bank account to make it a joint one with her nephew, one of the defendants, there arose a presumption of undue influence, and the court should have charged on undue influence and the shifting of the burden of proof, and erred in failing to charge thereon. McGahee v. Walden, 216 Ga. 352, 116 S.E.2d 559 (1960).

When evidence is presented of a confidential relationship, the grantor being of weaker mentality and the grantee occupying the dominant position, an issue of fact is raised as to undue influence. Fletcher v. Fletcher, 242 Ga. 158, 249 S.E.2d 530 (1978).

Jury instruction on undue influence. — Trial court erred in giving a jury instruction that stated that the jury could infer that undue influence existed if it found a confidential relationship was present; the testator made a gift of realty, and the testator was in a weakened mental state and feeble-minded, so the jury was entitled under those circumstances to presume, not merely infer, that undue influence had been shown. White v. Regions Bank, 275 Ga. 38, 561 S.E.2d 806 (2002).

Undue influence question for jury. — Evidence presented by a testator's child, which proved the testators's disease, medication, and its effects, the testator's dependence on the care givers, their isolation of the testator from the child; their active encouragement and arrangements for the drafting and execution of a new will, the testator's short-term relationship with them, the testator's sporadic contact with and lack of trust towards one of the challenged beneficiaries, and the testator's long-standing expressions of testamentary intent to leave all of the testator's property to the child, which the testator repeated the day after execution of the disposition, supplied sufficient evidence to support the child's claim of undue influence to support the jury verdict in the child's favor and not a directed verdict entered by the trial court in the face of this evidence; although this evidence did not demand a finding that the will was the product of undue influence, it was sufficient to authorize the submission of that question to the jury. Bailey v. Edmundson, 280 Ga. 528, 630 S.E.2d 396 (2006).

A trial court correctly denied an executor's motion for directed verdict in an action wherein the child of the testator filed a caveat and objection to the probate of the testator's last will and testament on the grounds that the will was the product of undue influence as sufficient evidence existed to support the conclusion that undue influence was used to have the testator bequeath the only asset, namely a home, to the caregiver who was hired by the executor. The record established that the executor blocked calls from the testator's child, refused to let the child see the testator, and a confidential relationship was established between the caregiver and the testator as the caregiver took an active role in the planning, preparation, and execution of the will. Bean v. Wilson, 283 Ga. 511, 661 S.E.2d 518 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, §§ 15, 16.

Am. Jur. Proof of Facts. — Interference with Attorney-Client Relationship, 19 POF2d 335.

Existence of Attorney-Client Relationship, 48 POF2d 525.

C.J.S. — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, §§ 2, 16, 35.

ALR. — Duty of joint adventures inter se in respect of acquisition or renewal of property rights or interests related to the enterprise, 62 A.L.R. 13.

Trustee's, executor's, administrator's or guardian's purchase from or sale to corporation of which he is an officer or stockholder, as voidable or as ground for surcharging his account, 105 A.L.R. 449.

Duty of vendor of real property to dis-

close to purchaser condition of building thereon which affects health or safety of persons using same, 141 A.L.R. 967.

23-2-59. Acquisition of antagonistic rights by one in confidential relationship.

Where, by the act or consent of parties or the act of a third person or of the law, one person is placed in such relation to another that he becomes interested for him or with him in any subject or property, he is prohibited from acquiring rights in that subject or property which are antagonistic to the person with whose interest he has become associated.

History. — Civil Code 1895, § 4031; Civil Code 1910, § 4628; Code 1933, § 37-708.

History of Code section. — This Code section is derived from the decision in Larey v. Baker, 86 Ga. 468, 12 S.E. 684 (1890).

Law reviews. — For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

JUDICIAL DECISIONS

A confidential relationship exists where one party occupies a position of trust and confidence with respect to another. Such a relationship can exist between an executor representing an estate of a decedent, and a legatee or devisee of the estate represented in administration. Ringer v. Lockhart, 240 Ga. 82, 239 S.E.2d 349 (1977).

Where the fiduciary relationship of principal and agent existed between the petitioner and the defendant, the agent could not make advantage or profit out of the relationship to the injury of the agent's principal. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214 (1958).

Confidential relationships in estate matters. — Where a widow and named executrix under the will of a decedent, who is left a life estate in all of the property of the decedent, advises the sole nonresident remainderman named in the will that the father's estate would be handled fairly and that he would not have to worry about his father's estate, immediately, without actual notice to him applies for and obtains an uncontested year's support awarding to her all of the property of the decedent's estate, a question is presented, as to whether or not the year's support judgment was obtained by fraud. Ringer v. Lockhart, 240 Ga. 82, 239 S.E.2d 349 (1977).

Under the evidence as to the existence of a partnership between the petitioner and the defendant and their agreement to jointly purchase the land involved, and evidence that the petitioner paid one-half of the purchase money and trusted the defendant to close the deal and obtain a conveyance naming them both as grantees, the defendant could not obtain an interest in the land antagonistic to that of the petitioner; and where the defendant procured a deed, in his own name only, equity would annul the conveyance and decree title in the petitioner to his share. Crosby v. Rogers, 197 Ga. 616, 30 S.E.2d 248 (1944).

Relationship of principal and agent, being confidential and fiduciary in character, demands of the agent the utmost loyalty and good faith to the agent's principal. Any breach of this good faith whereby the principal suffers any disadvantage and the agent reaps any benefit is a fraud of such nature as to preclude the agent from

taking or retaining the benefit. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214 (1958).

Competing with principal after agency terminates. — The principles of agency will not sustain grant of an injunction prohibiting competition after agency relationship is terminated. Pope v. Kem Mfg. Corp., 249 Ga. 868, 295 S.E.2d 290 (1982).

In absence of evidence of a restrictive covenant in employment contract, trial court erred in enjoining employee from soliciting business for himself from eight customers to whom he had sold similar products for his employer. Pope v. Kem Mfg. Corp., 249 Ga. 868, 295 S.E.2d 290 (1982).

No breach of duty when all partners enter into agreement at same time. — O.C.G.A. § 23-2-59, when construed in conjunction with O.C.G.A. § 14-8-21, applies only to partnership rights acquired by one partner without the consent of the other partners. Thus, when all limited partners and the general partner acquired their rights at the same time by entering into an agreement, there was no breach of fiduciary duty. Consolidated Equities Corp. v. Bird, 195 Ga. App. 45, 392 S.E.2d 276 (1990).

Writing requirement for post-employment covenant. — In order to be valid a post-employment covenant against competition by an employee who is not an officer or director must be in writing. Pope v. Kem Mfg. Corp., 249 Ga. 868, 295 S.E.2d 290 (1982).

Cited in Napier v. Adams, 166 Ga. 403, 143 S.E. 566 (1928); White v. Dotson, 41 Ga. App. 436, 153 S.E. 233 (1930); Thompson v. State, 47 Ga. App. 229, 170 S.E. 328 (1933); Blount v. Dean, 187 Ga. 494, 1 S.E.2d 653 (1939); Crosby v. Rogers, 197 Ga. 616, 30 S.E.2d 248 (1944); Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326 (1950); Howard v. Lee, 208 Ga. 735, 69 S.E.2d 263 (1952); Johnson v. Hutchinson, 217 Ga. 489, 123 S.E.2d 551 (1962); Brogdon v. Purvis, 220 Ga. 28, 136 S.E.2d 719 (1964); Cole v. Cates, 113 Ga. App. 540, 149 S.E.2d 165 (1966); Westminster Properties, Inc. v. Atlanta Assocs., 250 Ga. 841, 301 S.E.2d 636 (1983); Hanson v. First State Bank & Trust Co., 259 Ga. 710, 385 S.E.2d 266 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, §§ 15, 16.

C.J.S. — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, § 2.

ALR. — Right of insolvent to insure life for benefit of relatives, 34 A.L.R. 838.

Rights and remedies of original licensee or his estate, against one in fiduciary or confidential relation who acquires in his own name an occupational or business license, 144 A.L.R. 1013.

23-2-60. Annulment of conveyances for fraud.

Fraud will authorize equity to annul conveyances, however solemnly executed.

History. — Orig. Code 1863, § 3109; Code 1868, § 3121; Code 1873, § 3178; Code 1882, § 3178; Civil Code 1895, § 4032; Civil Code 1910, § 4629; Code 1933, § 37-709; Ga. L. 1986, p. 294, § 4.

JUDICIAL DECISIONS

Analysis

General Consideration
Equitable Relief Generally
Statute of Limitations

General Consideration

A court of equity will not lend its aid to a party to a contract founded upon an illegal or immoral consideration; if the contract is executed, it will be left to stand, and if it be executory, neither party can enforce it. Fender v. Crosby, 209 Ga. 896, 76 S.E.2d 769 (1953).

A person executing an instrument is not defrauded because he failed to read or understand it. Manget Realty Co. v. Carolina Realty Co., 169 Ga. 495, 150 S.E. 828 (1929).

When one party fraudulently induces one's adversary to withdraw one's defense, the judgment will be set aside. Walker v. Hall, 176 Ga. 12, 166 S.E. 757 (1932).

When a litigant keeps the opposite party from court, equity will relieve against the judgment obtained in his absence. Walker v. Hall, 176 Ga. 12, 166 S.E. 757 (1932).

The mere failure of a party to disclose to the court or to his adversary matters which would defeat his own claim or defense is not such fraud as will justify or require a vacation of the judgment. Buice v. T. & B. Bldrs., Inc., 219 Ga. 259, 132 S.E.2d 784 (1963).

A mere failure to comply with a promise on the part of a grantee is insufficient to establish fraudulent intent. However, where a petition alleges an oral promise by the grantee to perform an act in the future as the inducement or consideration for the execution of the deed by the grantor and where the promise is made with the present intention on the part of the grantee not to comply with it, the petition sets forth a cause of action for cancellation. Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326 (1950); Sutton v. McMillan, 213 Ga. 90, 97 S.E.2d 139 (1957); Hinson v. Hinson, 221 Ga. 291, 144 S.E.2d 381 (1965); Cowart v. Gay, 223 Ga. 635, 157 S.E.2d 466 (1967); Dye v. Dye, 231 Ga. 533, 202 S.E.2d 418 (1973); Cone Mills Corp. v. A.G. Estes, Inc., 377 F. Supp. 222 (N.D. Ga. 1974).

The mere failure to comply with a promise to perform an act in the future is not fraud in a legal sense. Hinson v. Hinson, 221 Ga. 291, 144 S.E.2d 381 (1965); Lanning v. Sockwell, 137 Ga. App. 479, 224 S.E.2d 119 (1976).

While the mere failure to comply with a promise is insufficient to establish an inceptive fraudulent intent, fraud will authorize equity to cancel and annul a deed no matter how solemnly executed. Sutton v. McMillan, 213 Ga. 90, 97 S.E.2d 139 (1957).

Cited in Bank of Penfield v. Colclough, 154 Ga. 222, 114 S.E. 33 (1922); J.R. Watkins Co. v. Herring, 51 Ga. App. 396, 180 S.E. 525 (1935); McGhee v. Minor, 188 Ga. 635, 4 S.E.2d 565 (1939); Saliba v. Saliba, 202 Ga. 279, 42 S.E.2d 748 (1947); McGahee v. McGahee, 204 Ga. 91, 48 S.E.2d 675 (1948); Johnson v. Hutchinson, 217 Ga. 489, 123 S.E.2d 551 (1962); Rushing v. Bashlor, 219 Ga. 119, 131 S.E.2d 775 (1963); Brogdon v. Purvis, 220 Ga. 28, 136 S.E.2d 719 (1964); Gaines v. Watts, 224 Ga. 321, 161 S.E.2d 830 (1968); Watts v. Gaines, 226 Ga. 503, 175 S.E.2d 871 (1970); DOT v. Livaditis, 129 Ga. App. 358, 199 S.E.2d 573 (1973); Hall v. Hall, 230 Ga. 873, 199 S.E.2d 798 (1973); Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977); Morgan v. Hawkins, 155 Ga. App. 836, 273 S.E.2d 221 (1980); Wessinger v. Spivey (In re Galbreath), 475 B.R. 749 (Bankr. S.D. Ga. 2003).

Equitable Relief Generally

To determine whether equity will set aside an award for fraud, former Code 1933, §§ 37-709 and 37-711 (see O.C.G.A. §§ 23-2-54 and 23-2-60) must be construed together. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933).

Fraud will authorize a court of equity to set aside a written instrument. Lanning v. Sockwell, 137 Ga. App. 479, 224 S.E.2d 119 (1976).

Inceptive fraud. — When the failure to perform the promised act is coupled with the present intention not to perform, fraud, in the legal sense, is present. This is known as inceptive fraud, and is sufficient to support an action for cancellation of a written instrument. Hinson v. Hinson,

Equitable Relief Generally (Cont'd)

221 Ga. 291, 144 S.E.2d 381 (1965); Lanning v. Sockwell, 137 Ga. App. 479, 224 S.E.2d 119 (1976).

When it is alleged that the sole consideration for the execution of the deed from the grantor to the grantee is the promise of the grantees to support, maintain, provide, and care for a third party, and that this promise is made by the grantees fraudulently and for the purpose of securing the signature of the grantor, to the conveyance, and that the grantees never intend to comply with their agreement, the allegations are sufficient to state a cause of action on the ground of inceptive fraud. Bucher v. Christopher, 211 Ga. 317, 85 S.E.2d 760 (1955).

Obligation to read written contract. — Any representation, act, or artifice intended to deceive, and which does deceive another, is such a fraud as may authorize cancellation of a written contract, but a party to a contract who can read must read or show a legal excuse for not doing so, and ordinarily, if fraud is the excuse, it must be such fraud as prevents the party from reading; nor in such case will a mere fraudulent statement by the opposite party or his agent as to the contents of the writing furnish a legal excuse. And where the contract is a deed to land, the rule will generally apply to the grantee as well as the grantor. Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385 (1942).

A cancellation obtained by fraud or mistake without payment may itself be canceled by equity. Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937); Lanning v. Sockwell, 137 Ga. App. 479, 224 S.E.2d 119 (1976).

Contract procured by fraud admissible for cancellation of deed. — If the execution of the contract was merely one of the incidents or stages by which the deed plaintiff sought to cancel was procured, evidence tending to show that the contract itself was procured by fraud was admissible for the purpose of canceling the deed. Morton v. Wallace, 177 Ga. 856, 171 S.E. 720 (1933).

Deed induced by fraud. — When land is owned by two persons, and one obtains a deed from the other to his interest by means of an intentionally false and fraudulent promise to sell the land at its true value and pay off an encumbrance and account for the balance, or failing to find a purchaser, he will procure a new loan to discharge the present encumbrance, and after obtaining the title he retains and claims the property as absolutely his own, this transaction by which the ownership is obtained is such a fraud as will entitle the grantor to have the deed canceled. Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326 (1950).

While the terms of an absolute deed cannot be varied by limiting the grantee to a use of the land in a manner not restricted by the express terms of the deed, it may nevertheless be alleged and proved that it was induced by fraud, without denying or varying any of the stipulations or conditions contained in the deed. Bucher v. Christopher, 211 Ga. 317, 85 S.E.2d 760 (1955).

Application of equity when intoxication renders one incapable of transacting business. — When a party at the time of entering into a contract or executing an instrument is intoxicated to such a degree as to deprive him of his reason and to disqualify his mind to apprehend the nature of his act and its probable consequences, a court of equity may grant relief by rescission and cancellation. McKaig v. Hardy, 196 Ga. 582, 27 S.E.2d 11 (1943); Ealy v. Tolbert, 209 Ga. 575, 74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

Equity will grant relief where the transfer of a valuable property has been fraudulently extorted, for a grossly inadequate consideration, from a person while in such a state of intoxication as to render him incapable of transacting business. Ealy v. Tolbert, 209 Ga. 575, 74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

Equity affording to widow right to cancel. — As against one who by fraud during the lifetime of deceased husband induced the latter to execute to him a deed to realty, equity will afford the widow, as personal representative, a remedy to cancel and set aside the deed and incidentally to preserve and apply rents issuing from such realty. Ealy v. Tolbert, 209 Ga. 575,

74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

Equity has jurisdiction to reform written instruments where there has been a mistake on the part of one of the parties, accompanied by fraud or inequitable conduct on the part of the other party, just as in cases where there is a mutual mistake. Thompson v. Thompson, 203 Ga. 128, 45 S.E.2d 632 (1947); Wellborn v. Johnson, 204 Ga. 389, 50 S.E.2d 16 (1948).

Petition contained sufficient allegations to show mistake on the part of the petitioner and fraud on the part of her own attorney, known to the attorney for the husband, and alleged a cause of action for reformation of contract between the parties and for modification of the judgment in the divorce suit accordingly. Thompson v. Thompson, 203 Ga. 128, 45 S.E.2d 632 (1947).

The general rule that an infant is bound by a judgment rendered in a suit in which he is represented by a next friend, to the same extent as though he were an adult, is subject to an exception in case of fraud, collusion, or like conduct on the part of the next friend, in which case the judgment may be set aside at the instance of the minor, even though it may be a consent judgment. Nelson v. Estill, 190 Ga. 235, 9 S.E.2d 73 (1940).

A decree adversely affecting the interests of minors, even though it be entered by consent of their father as next friend, may, if induced by fraud, duress, or the like, be set aside at their instance in a proper proceeding, and for that purpose they may sue by their mother as next friend. Nelson v. Estill, 190 Ga. 235, 9 S.E.2d 73 (1940).

As between the original parties thereto, fraud in its procurement voids a contract, and this upon the theory that, the consent of the parties being necessary to the binding force of a contract, if one, apparently consenting by the execution of a written contract, can show that he did not in fact consent to its terms as therein expressed, but that his apparent consent was induced by false and fraudulent practices, by means of which he was overreached by the other party, and, without negligence upon his own part, really deceived as to the terms of the contract, he would be entitled to be relieved from its apparent obligations. McKaig v. Hardy, 196 Ga. 582, 27 S.E.2d 11 (1943).

Statute of Limitations

An action to cancel a fraudulent deed must be brought within seven years from the discovery of the fraud. Harrison v. Holsenbeck, 208 Ga. 410, 67 S.E.2d 311 (1951).

While a deed to land procured by fraud will not ripen into prescriptive title regardless of the period of time possession is held thereunder, yet an action to cancel such deed upon the ground that it was fraudulently procured must be brought within seven years from the time the fraud is discovered, and is barred thereafter. Harrison v. Holsenbeck, 208 Ga. 410, 67 S.E.2d 311 (1951).

Pleading and Practice

While fraud may not be presumed, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence. Ringer v. Lockhart, 240 Ga. 82, 239 S.E.2d 349 (1977).

Slight evidence of fraud and undue influence may authorize the jury to cancel the deed. Harper v. Harper, 229 Ga. 583, 193 S.E.2d 616 (1972).

It is incumbent upon a party who attempts to rescind a contract for fraud to repudiate it promptly upon discovery of the fraud. Webb v. City of Atlanta, 188 Ga. 485, 4 S.E.2d 154 (1939).

Possession retained by the vendor, after an absolute sale of real or personal property, is prima facie evidence of fraud, which may be explained, and after the possession is proven, the burden of explaining it rests upon those who claim under the sale. Schoen v. Home Fed. Sav. & Loan Ass'n, 154 Ga. App. 68, 267 S.E.2d 466 (1980).

With proper pleadings and parties a judgment may be set aside in a court of law for fraud. Benton v. State Hwy. Dep't, 220 Ga. 674, 141 S.E.2d 396 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20.

C.J.S. — 30 C.J.S., Equity, § 48.

ALR. — Relief as regards outstanding money obligation in action for damages for fraud in inducing contract, 3 A.L.R. 74.

Right to recover back in an action at law money paid upon an existing judgment, procured by or grounded on fraud or mistake, 9 A.L.R. 400.

Necessity of participation by the grantee or transferee in the fraud of the grantor or transferor in order to avoid a voluntary conveyance or transfer as against creditors, 17 A.L.R. 728.

Necessity of exhausting remedies against other judgment debtor before bringing suit to set aside conveyance as fraudulent, 22 A.L.R. 200.

Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 33 A.L.R. 51.

Fraudulent misrepresentation or concealment by a contracting party concerning title to property or other subjects which are matters of public record, 33 A.L.R. 853; 56 A.L.R. 1217.

Right of one not in possession to maintain suit to remove cloud on title in case of fraud, 36 A.L.R. 698.

Fraud or perjury in misrepresenting status or relationship essential to the judgment as ground of relief from, or injunction against, judgment, 49 A.L.R. 1219.

Protection, as against third persons, of grantor tricked into delivering deed without getting cash payment contemplated, 57 A.L.R. 759.

Wife in respect of her right to maintenance or alimony as within protection of statute or rule avoiding conveyances or transfers in fraud of creditors or persons to whom maker is under legal liability, 79 A.L.R. 421.

Right to creditor to benefit of redemption from, acquisition or extinction of, outstanding right, title, or interest, by grantee or transferee in fraud of creditors, 87 A.L.R. 830.

Criterion of extrinsic fraud as distinguished from intrinsic fraud, as regards relief from judgment on ground of fraud, 88 A.L.R. 1201.

Principle which denies relief to party who has conveyed or transferred property in fraud of his creditors, as affected by execution, as part of, or as contemplated at time of, the fraudulent transaction, of reconveyance or retransfer of the property to him, 89 A.L.R. 1166.

Trustee's, executor's, administrator's, or guardian's purchase from or sale to corporation of which he is an officer or stockholder, as voidable or as ground for surcharging his account, 105 A.L.R. 449.

Avoidance on ground of fraud, mistake, duress, or mental incompetency of otherwise validly effected change of beneficiaries of insurance policies, 105 A.L.R. 950.

Form and particularity of allegations to raise issue of undue influence, 107 A.L.R. 832.

Return or tender of consideration for release or compromise as condition of action for rescission or cancellation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise, 134 A.L.R. 6.

Right to set aside, for benefit of heirs and distributees, a conveyance or transfer by decedent in fraud of his creditors, 148 A.L.R. 230.

Remedy available against invalid judgment in favor of United States, state, or other governmental unit immune to suit, 163 A.L.R. 244.

Fraud predicated upon vendor's misrepresentation of physical condition of real property, 174 A.L.R. 1010.

Concealment, misrepresentation, or mistake as regards identity of person for whom property is purchased as ground for cancellation of deed, 6 A.L.R.2d 812.

Capacity of cotenant to maintain suit to set aside conveyance of interest of another cotenant because of fraud, undue influence, or incompetency, 7 A.L.R.2d 1317.

Commitment of grantor to institution for insane as ground for setting aside conveyance in consideration of support, 18 A.L.R.2d 906.

Venue of action to set aside as fraudulent conveyance of real property, 37 A.L.R.2d 568.

Right of action for fraud, duress, or the like, causing instant plaintiff to release or

compromise a cause of action against third person, 58 A.L.R.2d 500.

Accountability and liability for rents and profits of grantee of fraudulently conveyed real property, 60 A.L.R.2d 593.

Disqualification of arbitrator by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion, or fraud of arbitrators, 65 A.L.R.2d 755.

Conveyance as fraudulent where made in contemplation of possible liability for future tort, 38 A.L.R.3d 597.

Corporation's measure of recovery against promoter who has made secret profit in sale of property to corporation, 84 A.L.R.3d 162.

Wills: challenge in collateral proceeding to decree admitting will to probate, on ground of fraud inducing complainant not to resist probate, 84 A.L.R.3d 1119.

Action based upon reconveyance, upon promise of reconciliation, of property realized from divorce award or settlement, 99 A.L.R.3d 1248.

Rule denying recovery of property to one who conveyed to defraud creditors as applicable where the claim which motivated the conveyance was never established, 6 A.L.R.4th 862.

ARTICLE 4

ACCOUNTING OF CONTRIBUTION; APPORTIONMENT; SETOFF

23-2-70. Scope of equity jurisdiction over matters of account.

Equity jurisdiction over matters of account shall extend to:

(1) Mutual accounts growing out of privity of contract;

(2) Cases where accounts are complicated and intricate;

(3) Cases where a discovery or writ of ne exeat is prayed and granted;

(4) Cases where the account is of a trust fund;

(5) Accounts between partners or tenants in common; and

(6) Cases where a multiplicity of actions would render a trial difficult, expensive, and unsatisfactory at law.

History. — Orig. Code 1863, § 3063; Code 1868, § 3075; Code 1873, § 3130; Code 1882, § 3130; Civil Code 1895, § 3989; Civil Code 1910, § 4586; Code 1933, § 37-301.

Law reviews. — For article, "Some Problems in Providing for Nonjudicial Settlement of the Trustee's Accounts," see 3 Ga. St. B.J. 417 (1967).

JUDICIAL DECISIONS

Analysis

General Consideration
Mutual Accounts
Complicated and Intricate Accounts
Trust Fund Account
Partners or Tenants in Common
Multiplicity of Actions

General Consideration

An accounting may be had at law. — The mere necessity of accounting to ascertain the amount due on a contract is insufficient to give equity jurisdiction to order an accounting. Insurance Ctr., Inc. v. Hamilton, 218 Ga. 597, 129 S.E.2d 801 (1963).

Therefore, an equitable accounting is not a proceeding to which every litigant has a right. It is granted only in carefully prescribed and determined circumstances, such as when an accounting at law is inadequate, and when the relationships and dealings between the parties are as set forth in this section. Herring v. Standard Guar. Ins. Co., 238 Ga. 261, 232 S.E.2d 544 (1977).

An equitable accounting is evidentiary in nature but the determination that an equitable accounting will be ordered is an interlocutory or preliminary matter separate and distinct from the equitable accounting itself. Herring v. Standard Guar. Ins. Co., 238 Ga. 261, 232 S.E.2d 544 (1977).

Right to attorney fees. — Because there were no excess proceeds from the foreclosure sale to which a condominium association would have been entitled, and regardless of whether it was the owner of the condominium at the time of the foreclosure it was not entitled to an equitable accounting, the association was also properly denied attorney fees under O.C.G.A. § 13-6-11 resulting from the bank's failure to provide an equitable accounting. Riverview Condo. Ass'n v. Ocwen Fed. Bank, FSB, 285 Ga. App. 7, 645 S.E.2d 5 (2007), cert. denied, No. S07C1254, 2007 Ga. LEXIS 705 (Ga. 2007).

This section contemplates only petitions in equity involving the traditional filing of the action and the issuance and service of process. Bodrey v. Bodrey, 225 Ga. 822, 171 S.E.2d 614 (1969), rev'd on other grounds sub nom. Wiley v. Wiley, 233 Ga. 824, 213 S.E.2d 682 (1975).

Equity does not have jurisdiction merely because the application for partition prays for an accounting as to common grantors when there was no filing of an action and summons and process. Bodrey v. Bodrey, 225 Ga. 822, 171 S.E.2d 614 (1969), rev'd on other grounds sub nom. Wiley v. Wiley, 233 Ga. 824, 213 S.E.2d 682 (1975).

When a fiduciary relation exists, an accounting in equity is proper. Atlanta Trust Co. v. National Bondholders Corp., 188 Ga. 761, 4 S.E.2d 644 (1939).

When petitioners, remainder legatees under their mother's will, sued defendant in three different capacities, namely, as trustee for the life estate under the will, as executrix, and as an individual, seeking an injunction against the sale of realty of the estate, partition, judgment, an accounting, and other and further relief, petitioners were entitled to an accounting. Matson v. Crowe, 193 Ga. 578, 19 S.E.2d 288 (1942).

In a proceeding to obtain an accounting, the complainant is not obliged to show how much is due, provided he avers facts sufficient to indicate that something will be found to be due him by the defendant. Atlanta Trust Co. v. National Bondholders Corp., 188 Ga. 761, 4 S.E.2d 644 (1939).

An injunction may be granted to continue during an accounting. Henderson v. Turner, 36 Ga. 263 (1867).

Action for accounting pending in court of law not automatically subject to injunction by filing equitable action. — Where it appears from a petition praying for an accounting that there was pending in another court an action by the corporate defendant against the plaintiff, such court being empowered to render an accounting between the parties, and no special reason being set out why a court of equity should assume jurisdiction for such purpose, equity will not enjoin the proceedings and processes of a court of law in the absence of some intervening equity or other proper defense of which the party, without fault on his part, cannot avail himself at law. Peeples v. Peeples, 193 Ga. 358, 18 S.E.2d 629 (1942).

There must be some special reason why a court proceeding in equity should take charge of an action where an accounting is requested, the petition must show, and this means more than the mere assertion of a conclusion, some reason why the remedy at law is inadequate. Peeples v. Peeples, 193 Ga. 358, 18 S.E.2d 629 (1942).

When transfer of accounting case from Supreme Court to Court of Appeals mandatory. — A suit for an accounting case, on appeal, must be transferred to the Court of Appeals from the Supreme Court, where the alleged facts show no unusual complication in the transactions or other ground for equitable relief additional to the relief which might be afforded by an accounting and judgment at law. Universal Garage Co. v. Fowler, 184 Ga. 604, 192 S.E. 299 (1937).

Borrower was not entitled to an equitable accounting because the borrower failed to allege facts sufficient to show that the borrower lacked an adequate remedy at law to ascertain the amount due on the borrower's loan. Phillips v. Ocwen Loan Servicing, LLC, No. 1:12-cv-3861-WSD, 2013 U.S. Dist. LEXIS 129721 (N.D. Ga. Sept. 10, 2013).

Cited in McLaren v. Steapp, 1 Ga. 376 (1846); Napier v. Napier, 6 Ga. 404 (1849); Shivers v. Palmer, 14 Ga. 342 (1853); McRarey v. Huff, 32 Ga. 681 (1861); Dill v. McGehee, 34 Ga. 438 (1886); McDonald v. Davies, 43 Ga. 356 (1871); Wilson & Co. v. Riddle, 48 Ga. 609 (1873); Sloan v. Cooper, 54 Ga. 486 (1875); Epping v. Aiken, 71 Ga. 682 (1883); Neel v. Morris, 73 Ga. 406 (1884); Gould v. Barrow, 117 Ga. 458, 43 S.E. 702 (1903); Allen v. Grant, 122 Ga. 552, 50 S.E. 494 (1905); Houston v. Polk, 124 Ga. 103, 52 S.E. 83 (1905); McArthur v. Jordan, 139 Ga. 304, 77 S.E. 150 (1913); Greer v. Jackson, 146 Ga. 376, 91 S.E. 417 (1917); McKey v. Wright, 147 Ga. 662, 95 S.E. 217 (1918); Central of Ga. Ry. v. Wright, 148 Ga. 86, 95 S.E. 963 (1918); Burress v. Montgomery, 148 Ga. 548, 97 S.E. 538 (1918); Mathewson v. Reed, 149 Ga. 217, 99 S.E. 854 (1919); Payne v. West Point Whsle. Grocery Co., 151 Ga. 46, 105 S.E. 608 (1921); Pickens v. Jackson, 152 Ga. 100, 108 S.E. 536 (1921); Goolsby v. Board of Drainage Comm'rs, 156 Ga. 213, 119 S.E. 644 (1923); Arthur Tufts Co. v. DeJarnette Supply Co., 158 Ga. 85, 123 S.E. 16 (1924); Thigpen v. Aldred, 175 Ga. 120, 165 S.E. 27 (1932); City of Macon v. Ries, 179 Ga. 320, 176 S.E. 21 (1934); New Winder Lumber Co. v. Guest, 182 Ga. 859, 187 S.E. 63 (1936); Kennedy v. Howard, 183 Ga. 410, 188 S.E. 673 (1936); Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937); Henderson v. Curtis, 185 Ga. 390, 195 S.E. 152 (1938); Reynolds v. Hyers, 190 Ga. 200, 9 S.E.2d 78 (1940); Park v. Park, 37 F. Supp. 185 (N.D. Ga. 1941); O'Rear v. Lamb, 194 Ga. 455, 22 S.E.2d 74 (1942); Clement A. Evans & Co. v. Waggoner, 197 Ga. 857, 30 S.E.2d 915 (1944); Martin v. Home Owners Loan Corp., 198 Ga. 288, 31 S.E.2d 407 (1944); Clark v. Bandy, 198 Ga. 564, 32 S.E.2d 245 (1944); Fulmer v. Wilkins, 201 Ga. 322, 39 S.E.2d 405 (1946); Walker Elec. Co. v. Walton, 203 Ga. 246, 46 S.E.2d 184 (1948); Regents of Univ. Sys. v. Carroll, 203 Ga. 292, 46 S.E.2d 496 (1948); Ballenger v. Houston, 207 Ga. 438, 62 S.E.2d 189 (1950); West View Corp. v. Thunderbolt Yacht Basin, Inc., 208 Ga. 93, 65 S.E.2d 167 (1951); Cashin v. Markwalter, 208 Ga. 444, 67 S.E.2d 226 (1951); Gaulding v. Courts, 210 Ga. 527, 81 S.E.2d 460 (1954); Adams v. McGehee, 211 Ga. 498, 86 S.E.2d 525 (1955); Johnson v. Wilson, 212 Ga. 264, 91 S.E.2d 758 (1956); Kirchman v. Kirchman, 212 Ga. 488, 93 S.E.2d 685 (1956); Douglas-Guardian Whse. Corp. v. Todd, 212 Ga. 791, 96 S.E.2d 275 (1957); Springs v. Bulloch, 213 Ga. 164, 97 S.E.2d 582 (1957); Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214 (1958); Mendenhall v. Kingloff, 215 Ga. 726, 113 S.E.2d 449 (1960); Gandy v. Robinson Co., 216 Ga. 190, 115 S.E.2d 341 (1960); Edwards v. United Stone & Allied Prods. Workers of Am., 220 Ga. 183, 137 S.E.2d 632 (1964); Rogers v. Griggs, 134 Ga. App. 528, 215 S.E.2d 291 (1975); Meredith v. Smith & Shiver, 157 Ga. App. 522, 277 S.E.2d 805 (1981); Faircloth v. A.L. Williams & Assocs., 219 Ga. App. 560, 465 S.E.2d 722 (1995); HAAC Chile, S.A. v. Bland Farms, LLC, No. 606CV086, 2008 U.S. Dist. LEXIS 81859 (S.D. Ga. Aug. 26, 2008).

Mutual Accounts

Mutual accounts may be setoff at law by former Civil Code 1910, § 4341 (see O.C.G.A. § 13-7-4) although equity has jurisdiction under former Civil Code 1910, § 4586 (see O.CG.A. § 23-2-70). Hardin v. Stanton, 14 Ga. App. 299, 80 S.E. 698 (1914).

An agent must account to his principal where he has sold unknown quantities of goods to third persons. Mitchem v.

Mutual Accounts (Cont'd)

Georgia Cotton Oil Co., 139 Ga. 519, 77 S.E. 627 (1913).

Complicated and Intricate Accounts

Facts rendering equitable accounting proper. — The life tenant having sustained a fiduciary relationship to the plaintiff, a remainderman, and the subject matter of the accounting being shown to be complicated because of the life tenant confusing and commingling her own funds with the money which upon her death became part of the remainder estate, the accounting, properly granted, is an equitable accounting. Perkins v. First Nat'l Bank, 221 Ga. 82, 143 S.E.2d 474 (1965).

Equitable accounting was unavailable absent allegations that the accounts were particularly complicated or that the amount owed could not be determined through the discovery process. Ralls Corp. v. Huerfano River Wind, LLC, 27 F. Supp. 3d 1303 (N.D. Ga. 2014).

Trust Fund Account

Remedy when trustee's funds commingled with trust funds. — When a trustee has so mingled the trust funds with the trustee's own estate that they cannot be distinguished, a cestui que trust may bring a bill in equity to reach the trustee's interest. Evans v. Pennington, 50 Ga. App. 146, 177 S.E. 357 (1934).

Partners or Tenants in Common

A court of equity has jurisdiction in all cases of an accounting and settlement between partners. Smith v. Hancock, 163 Ga. 222, 136 S.E. 52 (1926).

An accounting without dissolution will be granted where one partner refuses to allow another to participate in the business. Hogan v. Walsh, 122 Ga. 283, 50 S.E. 84 (1905); Zerounis v. Berry, 199 Ga. 410, 34 S.E.2d 275 (1945).

A prayer that one partner be compelled to pay another one-half of the net profit of the business includes a prayer for accounting. Bennett v. Woolfolk, 15 Ga. 213 (1854).

Depreciation of assets subsequent to the dissolution must be borne by the partnership. Houston v. Polk, 124 Ga. 103, 52 S.E. 83 (1905).

Partners may have a receiver appointed to settle the partnership affairs. Bennett v. Smith, 108 Ga. 466, 34 S.E. 156 (1899).

The waiver of discovery by a partner is immaterial. Huger v. Cunningham, 126 Ga. 684, 56 S.E. 64 (1906).

When equitable action not maintainable. — Where the plaintiff contends all partnership relations between the plaintiff and the defendant have come to an end, that a balance has been struck, and that an indebtedness is allegedly due by the defendant to the plaintiff, which cannot be affected by any transactions between the partnership and its creditors or debtors, this is not an equitable action by a member of a firm against his copartner, but an action of law, one man against another who had formerly been his partner, upon an indebtedness a part of which grew out of the formerly existing partnership between them. Manry v. Hendricks, 192 Ga. 319, 15 S.E.2d 434 (1941).

Action for accounting not tenable in equity. — Where the partnership has been fully dissolved by written contract and the rights of each party definitely established, in case of a breach of such contract equity will not order an accounting, as the remedy is at law. Manry v. Hendricks, 192 Ga. 319, 15 S.E.2d 434 (1941).

When an accounting is involved a city court is without jurisdiction. Dixon v. Hyde, 25 Ga. App. 84, 102 S.E. 910 (1920).

Cotenant may be compelled in equity to account to another for a just share of the profits. Huff v. McDonald, 22 Ga. 131, 68 Am. Dec. 487 (1857).

Equity has concurrent jurisdiction with courts of law, over matters of account between tenants in common, and when asserted, a court will hold and exercise equitable jurisdiction for the purpose of settling all the equities between the tenants, growing out of the tenancy in common. Bailey v. Bell, 209 Ga. 566, 74 S.E.2d 881 (1953).

A case in equity is presented by a petition which not only embraces a

statutory application for partition, but also prays for an accounting from cotenants for rents and profits. Werner v. Werner, 196 Ga. 1, 25 S.E.2d 676 (1943).

Exercise by the superior court of its equity jurisdiction to fully and adequately resolve all issues between tenants in common would not be an interference with the orderly administration of estate. Evans v. Little, 246 Ga. 219, 271 S.E.2d 138 (1980).

When action for partitioning and accounting proper. — Where a number of cotenants are in possession of all of the common property, and are collecting the rents and profits thereof, an equitable action for partitioning and accounting by those not in possession of the property is a proper remedy. Bailey v. Bell, 209 Ga. 566, 74 S.E.2d 881 (1953).

Accounting between cotenants for a just share of the profits is applicable where a partition of the land is granted. Turnbull v. Foster, 116 Ga. 765, 43 S.E. 42 (1902).

A court may entertain a partition proceeding without trying first, or in connection therewith, a suit for accounting concerning the same property held in cotenancy. Lankford v. Milhollin, 200 Ga. 512, 37 S.E.2d 197 (1946).

It is within the power of the court to order a sale of the common property prior to the trial of the main accounting suit. Whether such partition proceeding is heard before the trial of the suit for accounting is a matter resting within the sound discretion of the court. Lankford v. Milhollin, 200 Ga. 512, 37 S.E.2d 197 (1946).

While equity jurisdiction ceased when the General Assembly gave a specific remedy at law, and while a specific legal remedy for partition was provided by statutory partition (O.C.G.A. § 44-6-160) and under former Code 1933, § 85-1501 (see O.C.G.A. § 44-6-140) equity will not ordinarily take cognizance of a partition proceeding unless the remedy at law was insufficient, or peculiar circumstances render the proceeding in equity more suitable and just, accounting between tenants in common will alone and of itself give a court of equity jurisdiction of a partition proceeding, whether or not there were other peculiar circumstances which render the proceeding in equity more suitable and just. Mills v. Williams, 208 Ga. 425, 67 S.E.2d 212 (1951).

Counterclaim for partition by sale proper. — Where a tenant-in-common sues his cotenant for an accounting and for rents and profits, and a cross action (now counterclaim) is filed by the latter for partition by sale of the common property, such cross action (now counterclaim) is germane to the original action, and the court may direct partition by sale where it appears that the common property cannot be fairly and equitably divided by metes and bounds and it is proper for the decree to direct that the funds be held in court pending the trial of the action for accounting. Lankford v. Milhollin, 200 Ga. 512, 37 S.E.2d 197 (1946).

Distribution of sales proceeds upheld. — In a dispute over real property and specific performance of a Redemption Agreement, the trial court did not abuse the court's discretion in making an equitable award because O.C.G.A. §§ 44-6-140 and 44-6-141 granted the court the authority to adjust the accounts and claims of the parties as required by the circumstances and, more specifically, authorized the trial court to consider all of the circumstances, including any circumstances that occurred after the making of the contract. Bagwell v. Trammel, 297 Ga. 873, 778 S.E.2d 173 (2015).

Accessory to misapplication of trust funds accountable to injured person. — One who aids and assists a trustee in misapplying trust funds, with knowledge of his misconduct, is directly accountable to the person injured by such misapplication, even though the person thus assisting the trustee does not himself reap the fruits of the misappropriation. Atlanta Trust Co. v. National Bondholders Corp., 188 Ga. 761, 4 S.E.2d 644 (1939).

Person injured by the misconduct may join in one suit the person occupying the fiduciary relationship and one who aids and assists one in misapplying trust assets. Atlanta Trust Co. v. National Bondholders Corp., 188 Ga. 761, 4 S.E.2d 644 (1939).

Some evidence admissible in accounting action. — In an action for

Partners or Tenants in Common (Cont'd)

accounting and other relief between joint owners of property, tax receipts tending to show that one of the owners had paid the tax on the joint property for certain years were admissible. Head v. Lee, 203 Ga. 191, 45 S.E.2d 666 (1947).

Effect of consent decree on equitable action between cotenants. — Where one tenant in common brings an equitable action against his cotenants for partition of land and for an accounting of rents, issues, and profits, and a consent decree is taken, fixing the rights and liabilities of the parties as between themselves, and decreeing their respective interests in the land, in the further progress of the case, where the decree is not attacked, the parties will not be permitted to go behind the decree so as to reopen the subject. All prior agreements and controversies between the parties, whether such were expressly pleaded or not, are merged in the decree. Johnson v. James, 246 Ga. 680, 272 S.E.2d 692 (1980).

Multiplicity of Actions

Equitable jurisdiction not grounded on avoidance of multiplicity of actions alone. — While avoidance of a multiplicity of actions, in a proper case, may be considered as an independent ground of equitable jurisdiction, and not a mere auxiliary to other equities present, it does not alone create an equitable cause of action, regardless of other circumstances. Dobbs v. FDIC, 187 Ga. 569, 1 S.E.2d 672 (1939).

Consolidation of actions seeking equitable accounting warranted. — Where the issue in dispossessory warrant and distress warrant proceedings is the same, to wit: does the lessee in those cases owe any rent to the lessor therein? and where a third case involves the same lease contract, the same parties, and the same claims for rent, and the lessee's petition asserts a defense to the lessor's claims on the ground that, upon an equitable accounting, it will be found that the lessee does not owe the lessor any sum as rent, but that on the contrary the lessor is liable to the lessee, and the lease contract has not terminated, the three cases should be consolidated. West View Corp. v. Thunderbolt Yacht Basin, Inc., 208 Ga. 93, 65 S.E.2d 167 (1951).

Because an employee had a breach of contract claim for failure to pay the employee severance that came with the availability of extensive discovery, the employee had an adequate remedy at law, and the trial court did not err in granting the employer's motion for summary judgment on the employee's equitable accounting claim. Vernon v. Assurance Forensic Accounting, LLC, 333 Ga. App. 377, 774 S.E.2d 197 (2015), cert. denied, No. S15C1837, 2015 Ga. LEXIS 864 (Ga. 2015).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Accounts and Accounting, § 52 et seq.

ALR. — Rights of cotenants inter se as to timber, 2 A.L.R. 993; 41 A.L.R. 582.

Avoidance of multiplicity of suits as ground of jurisdiction in equity of a suit by one out of possession to quiet title against persons in possession of different portions of the land in severalty, 30 A.L.R. 109.

Accounting in equity in case of tort, 53 A.L.R. 815.

Right of owner of property to maintain bill for accounting against lien holder or pledgee, 79 A.L.R. 201.

Propriety of suit in equity by or against several insurers under fire policies covering same risk, 98 A.L.R. 181.

Previous demand for, and refusal of, an accounting, as condition of actions of account or for an accounting, 143 A.L.R. 1211.

Availability of equitable remedy of accounting between principal and agent, 3 A.L.R.2d 1310.

Delay as defense to action for accounting between joint adventurers, 13 A.L.R.2d 765.

Equity jurisdiction to determine valuation, where arbitration or appraisal has failed, under long-term lease providing for

appraisal of premises and fixing rental value at stated intervals, 26 A.L.R.2d 744.

Right of partner or joint adventurer to accounting where firm business or transactions are illegal, 32 A.L.R.2d 1345.

Right to accounting between attorneys associated in practice, in absence of formal partnership, 81 A.L.R.2d 1420.

23-2-71. Entitlement to contribution; when equity has jurisdiction.

In cases of joint, joint and several, or several liabilities of two or more persons, where all are equally bound to bear the common burden and one has paid more than his share, he shall be entitled to contribution from the others; and whenever the circumstances are such that an action at law will not give a complete remedy, equity may entertain jurisdiction.

History. — Orig. Code 1863, § 3065; Code 1868, § 3077; Code 1873, § 3132; Code 1882, § 3132; Civil Code 1895, § 3991; Civil Code 1910, § 4588; Code 1933, § 37-303.

Cross references. — Right to contribution among joint trespassers, § 51-12-32.

Law reviews. — For note, "Contribution Among Joint Tortfeasors," see 12 Ga. L. Rev. 553 (1978).

JUDICIAL DECISIONS

When contribution can be granted as relief. — Contribution cannot properly be granted as affirmative relief unless the party claiming such relief has been compelled to discharge a liability for which he and the other party were equally bound. Klausman v. Klausman, 186 Ga. App. 669, 368 S.E.2d 185, cert. denied, 186 Ga. App. 918, 368 S.E.2d 185 (1988).

Enforcement of execution to compel contribution from joint defendants. — Joint defendants who have paid an execution against themselves and others, and procured a written transfer of it from the plaintiff in fi. fa., may enforce the execution against other defendants for contribution. Miller v. Perkerson, 128 Ga. 465, 57 S.E. 787 (1907).

An agreement between the parties may absolve one of them from any duty to contribute. Chattahoochee Brick Co. v. Braswell, 92 Ga. 631, 18 S.E. 1015 (1893).

Relationship of joint tort-feasors required for right to contribution. — In an action by tenants' insurers against suppliers of building materials for losses due to fire damage to the building, the suppliers did not have a right to contribution from the landlord since the tenants and the landlord had agreed in leases not to sue each other before for losses covered by insurance; thus, no cause of action by the insurers against the landlord ever arose and the landlord could not be a joint tort-feasor with the suppliers. Glazer v. Crescent Wallcoverings, Inc., 215 Ga. App. 492, 451 S.E.2d 509 (1994).

While the doctrine of contribution originated in courts of equity, it was subsequently adopted by courts of law and is now universally applied therein. In order to make the doctrine consistent with the forms, theories, and practices of courts of law, the fiction of an implied contract by one obligor to contribute to another co-obligor who had been compelled to pay the whole obligation was adopted. Watkins v. Woodbery, 148 Ga. 249, 96 S.E. 338 (1918); Powell v. Powell, 171 Ga. 840, 156 S.E. 677 (1931), later appeal, 179 Ga. 817, 117 S.E. 566 (1934); Black v. Davidson, 65 Ga. App. 780, 16 S.E.2d 525 (1941); Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945); Southern Ry. v. State Farm Mut.

Auto. Ins. Co., 357 F. Supp. 810 (N.D. Ga. 1972), aff'd, 477 F.2d 49 (5th Cir. 1973).

Actual assignment of the right to enforce contribution may be made. Hall v. Harris, 6 Ga. App. 822, 65 S.E. 1086 (1909).

Successive purchasers of a mortgagor's estate are not liable to contribution among themselves. Cumming v. Cumming, 3 Ga. 460 (1847).

Equitable relief to secure a waiver of homestead contained in a note paid by a joint obligor will be granted. Sherling v. Long, 122 Ga. 797, 50 S.E. 935 (1905).

There is no line of separation between the liability of joint tort-feasors. — The tort is a thing integral and indivisible, and any claim for injuries arising therefrom runs through and embraces every part of the tort. The liability of one cannot be carried into any portion of the joint tort that is not followed by an equal liability of the other tort-feasor. Eidson v. Maddox, 195 Ga. 641, 24 S.E.2d 895 (1943).

Petition must allege that the debt has been paid. Huey v. Stewart, 69 Ga. 768 (1882).

Petition does not lie in the mouth of petitioner to claim contribution when it has paid nothing upon the alleged joint obligation. Autry v. Southern Ry., 167 Ga. 136, 144 S.E. 741 (1928).

However, it is unnecessary to show that a common debt has been paid in full either by the plaintiff or by any other person. In some decisions there are expressions which might imply that the whole debt must be paid before an action for contribution will lie, but such was not the rule at common law, nor is there any such requirement under this Code. Herrington v. Wimberly, 177 Ga. 536, 170 S.E. 670 (1933).

Prerequisite to contribution. — Before one is entitled to contribution as an affirmative remedy, he must show not only a common liability, but payment by him of more than his share. Snyder v. Elkan, 187 Ga. 164, 199 S.E. 891 (1938).

Trial court properly granted partial summary judgment to the former business partners on the separate entity partners' counterclaim that the separate entity partners were owed money due to the former business partners' alleged failure to pay their share of a settlement agreement entered into after a franchiser filed separate suits seeking unpaid royalties; nothing of record showed that either of the separate entity partners paid any portion of the settlement and, in fact, the record showed that the corporation formed by the former business partners and the separate entity partners paid it. Carter v. Parish, 274 Ga. App. 97, 616 S.E.2d 877 (2005).

When right to contribution arises. — When a principal obligor with his own funds pays a joint debt due by him and a coprincipal, the right of the former upon the implied contract of the latter to bear his share of the common burden arises when the one paying the joint debt extinguishes the debt of their common debtor. Powell v. Powell, 171 Ga. 840, 156 S.E. 677 (1931), later appeal, 179 Ga. 817, 177 S.E. 566 (1934).

Debtor established that a defendant was liable to the debtor for a joint and several liability pursuant to O.C.G.A. § 23-2-71 because plaintiff had shown that both parties were co-obligors on the debts of two creditors, that plaintiff had paid the entirety of the debts, and that defendant was liable for a contribution from defendant. Citrico Int'l, Ltd. v. Citrico, Inc. (In re Citrico Int'l, Ltd.), No. 04-73442-MGD, 2009 Bankr. LEXIS 423 (Bankr. N.D. Ga. Jan. 26, 2009).

Period of limitation applicable to an action for contribution based upon an implied contract is four years from the time the right of action accrues. Sherling v. Long, 122 Ga. 797, 50 S.E. 935 (1905); Powell v. Powell, 171 Ga. 840, 156 S.E. 677 (1931), later appeal, 179 Ga. 817, 177 S.E. 566 (1934).

Even after the dissolution of a partnership, the statute of limitations does not begin to run in favor of one partner against another until the partnership affairs, as to debtors and creditors of the firm, have been wound up and settled, or, at least, a sufficient time has elapsed since the dissolution to raise the presumption that such was the fact, nor, while there are outstanding assets and liabilities, will a partner be barred as against

his copartner on the principle of stale demands. Powell v. Powell, 171 Ga. 840, 156 S.E. 677 (1931), later appeal, 179 Ga. 817, 177 S.E. 566 (1934).

Principle of contribution is equality in bearing a common burden. Eidson v. Maddox, 195 Ga. 641, 24 S.E.2d 895 (1943); Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945); Williams Bros. Lumber Co. v. Anderson, 210 Ga. 198, 78 S.E.2d 612 (1953).

Doctrine of contribution is not founded upon contract, but upon principles of equity, and assists in the fair and just division of losses, preventing unfairness and injustice. Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

Rule doctrine of contribution based on. — The general rule is that one who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares. Eidson v. Maddox, 195 Ga. 641, 24 S.E.2d 895 (1943); Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

Co-obligors on notes or other obligations for payment of money are equally bound, and must equally contribute to the discharge of such an obligation, and one of the joint makers who pays more than his share of the obligation may enforce contribution from any of his joint obligors who fails or refuses to discharge his aliquot proportion of the joint liability, but inequality of benefits or interest between co-obligors may destroy equality of contribution between them, and a variance between the amounts of their primary liability to the common creditor may have the same effect; thus, when the several co-obligors on a promissory note receive different amounts on account of the note, they are liable to contribute, not equally, but in proportion to the amount received by each of them. Davis v. Perkins, 178 Ga. 195, 172 S.E. 562 (1934).

Co-debtors and sureties distinguished. — Cases interpreting O.C.G.A. § 23-2-71 distinguish between a co-debtor, who is entitled to contribution upon payment of the debt, and a surety, who is legally subrogated to the rights of the creditor and is entitled to sue on the original indebtedness upon payment of the debt. Johnson v. AgSouth Farm Credit, 267 Ga. App. 567, 600 S.E.2d 664 (2004).

A joint obligor is not subrogated in law to the rights of the creditors as against one's co-obligor for contribution. One merely has a right of contribution Sherling v. Long, 122 Ga. 797, 50 S.E. 935 (1905).

A continuance granted to one joint obligor enures to all. Medlock v. Wood, 4 Ga. App. 368, 61 S.E. 516 (1908).

Contribution among joint tort-feasors is enforceable when one has paid more than one's pro rata share of a judgment. Southern Ry. v. State Farm Mut. Auto. Ins. Co., 357 F. Supp. 810 (N.D. Ga. 1972), aff'd, 477 F.2d 49 (5th Cir. 1973).

Doctrine of contribution can be applied against the insurer of a joint tort-feasor. Southern Ry. v. State Farm Mut. Auto. Ins. Co., 357 F. Supp. 810 (N.D. Ga. 1972), aff'd, 477 F.2d 49 (5th Cir. 1973).

Indemnitor or insurer of one joint tort-feasor, upon discharging the common liability, succeeds to the right to recover contribution from other joint tort-feasors, or their indemnitors, or insurers. Southern Ry. v. State Farm Mut. Auto. Ins. Co., 357 F. Supp. 810 (N.D. Ga. 1972), aff'd, 477 F.2d 49 (5th Cir. 1973).

Right of contribution extends equally to actions ex contractu and actions ex delicto, when all are equally bound to bear the common burden, and one has paid more than one's share. Southern Ry. v. City of Rome, 179 Ga. 449, 176 S.E. 7 (1934); City of Rome v. Southern Ry., 50 Ga. App. 185, 177 S.E. 520 (1934); Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945); Goldhill v. Kramer, 122 Ga. App. 39, 176 S.E.2d 232 (1970).

Contribution unrestricted. — The permission to have contribution "where all are equally bound to bear the common burden, and one has paid more than his share," is absolutely unrestricted. South-

ern Ry. v. City of Rome, 179 Ga. 449, 176 S.E. 7 (1934); Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

Contribution has been defined to be a payment made by each, or by any, or several having a common interest of liability of his share in the loss suffered, or in the money necessarily paid by one of the parties in behalf of the others. It is the right of one who has discharged a common liability or burden to recover of another also liable the aliquot portion which he ought to pay or bear. Eidson v. Maddox, 195 Ga. 641, 24 S.E.2d 895 (1943).

In case of insolvency of a surety the solvent sureties must bear equally the burden of payment. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

There is no authority which allows a cosurety to convert his action for contribution into something else merely by founding his action on the original evidence of indebtedness. It is still a suit to enforce contribution from cosureties, and plaintiff is bound by the substantive rules pertaining to contribution. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

It is not some independent right but the right to contribution which is being enforced, and it is an action on the original evidence of indebtedness by way of subrogation to the creditor's remedy which is allowed to the surety merely as a form of action in aid of the right to contribution from cosureties. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

Sureties' liability for contribution several and not joint. — Since the substantive right and liability being enforced is that of contribution between co-obligors, each is liable only for an equal proportionate share of the debt. This liability is several and not joint, and a joint obligor who has paid the joint obligation is entitled to judgment against each of one's co-obligors only for the proportion for which each is liable; judgment should not be entered against any one of them or against all of them jointly for the aggregate amount due from them. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

Surety cannot obtain a joint and general judgment against co-sureties for contributions. — There is no authority for the proposition that a surety or other co-obligor, however one may find one's action for contribution, may obtain a joint and several judgment against one's several co-sureties for the aggregate amount due one. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

Contribution limited to proportionate share of whole obligation. — If there be several guarantors, some of whom have paid off the obligation, their right against the remaining guarantors, or persons secondarily liable, is only for contribution as to the proportionate share of the whole. Auerback v. Maslia, 142 Ga. App. 184, 235 S.E.2d 594 (1977).

When contribution against tort-feasors not available. — Where separate judgments are entered against tort-feasors whose concurrent, independent negligence results in damage to the plaintiff's property, the verdict and judgment against each tort-feasor adjudicates the amount of his liability. In such circumstances there is no right of contribution between the tort-feasors. The right of contribution under the law is based upon one party bearing more than his share of "a common burden." Hardwick v. Georgia Power Co., 100 Ga. App. 38, 110 S.E.2d 24 (1959).

When contribution not available in partnership. — When the business of a copartnership entails loss and when no part of the copartnership debts has been paid, no right of contribution arises, and no right to setoff partnership liabilities against a suit on a note by one of the partners against the other partners. Brinson v. Franklin, 177 Ga. 727, 171 S.E. 287 (1933).

Co-employee's liability for contribution to third party. — The exclusive remedy provision of the Worker's Compensation Act, O.C.G.A. § 34-9-1 et seq., precludes a defendant in a personal injury action from asserting a third-party contribution claim against a co-employee of the plaintiff; reversing Brown v. Weller, 217 Ga. App. 67, 456 S.E.2d 602 (1995). Weller v. Brown, 266 Ga. 130, 464 S.E.2d 805 (1996).

Cited in Edge v. Edge, 62 Ga. 289 (1879); Neel v. Morris, 73 Ga. 406 (1884);

Hall v. Harris, 6 Ga. App. 822, 65 S.E. 1086 (1909); Miller v. Jones, 136 Ga. 428, 71 S.E. 910 (1911); Ward v. Fleming, 18 Ga. App. 128, 88 S.E. 899 (1916); Watkins v. Woodbery, 24 Ga. App. 80, 100 S.E. 34 (1919); Walker v. Industrial Stores Co., 37 Ga. App. 448, 140 S.E. 519 (1927); Rome Ry. & Light Co. v. Southern Ry., 42 Ga. App. 786, 157 S.E. 527 (1931); Federal Land Bank v. Farmers' & Merchants' Bank, 177 Ga. 505, 170 S.E. 504 (1933); Gazaway v. Nicholson, 190 Ga. 345, 9 S.E.2d 154 (1940); Chapman v. Lamar-Rankin Drug Co., 64 Ga. App. 493, 13 S.E.2d 734 (1941); Rose v. Crane Heating Co., 198 Ga. 295, 31 S.E.2d 717 (1944); Southeastern Erection Co. v. Flagler Co., 108 Ga. App. 831, 134 S.E.2d 822 (1964); Whiddon v. Forshee, 228 Ga. 133, 184 S.E.2d 349 (1971); Chastain v. Simmons, 142 Ga. App. 615, 236 S.E.2d 678 (1977); Sturdivant v. Chapman, 146 Ga. App. 26, 245 S.E.2d 311 (1978); Rambo v. Cobb Bank & Trust Co., 146 Ga. App. 204, 245 S.E.2d 888 (1978); George R. Hall, Inc. v. Superior Trucking Co., 532 F. Supp. 985 (N.D. Ga. 1982); Hopkins v. Hopkins, 186 Ga. App. 530, 367 S.E.2d 825 (1988); Ragsdale v. Bank S. (In re Whitacre Sunbelt, Inc.), 206 Bankr. 1010 (Bankr. N.D. Ga. 1997); Gerschick v. Pounds, 262 Ga. App. 554, 586 S.E.2d 22 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Contribution, § 64 et seq.

C.J.S. — 18 C.J.S., Contribution, § 1 et seq.

ALR. — Release of one of several joint or joint and several contract obligors as affecting liability of other obligors, 53 A.L.R. 1420.

Proportion of obligation enforceable by way of contribution between joint obligors, 64 A.L.R. 213.

Right of owner of property to maintain bill for accounting against lien holder or pledgee, 79 A.L.R. 201.

May acts of independent tort-feasors, each of which alone causes or tends to produce some damage, be combined to create a joint liability, 91 A.L.R. 759.

Judgment for plaintiff in action in tort or contract against codefendants, as conclusive in subsequent action between codefendants as to the liability of both or the liability of one and nonliability of the other, 101 A.L.R. 104; 142 A.L.R. 727.

Right as between employer primarily responsible under Workmen's Compensation Act and employer secondarily liable under that act (or their insurers) where injury was due to latter's negligence, 117 A.L.R. 571.

Cotenant's right to contribution in respect of taxes, improvements, or repairs as subject to reduction on account of rents and profits for which he is not otherwise responsible, 136 A.L.R. 1022.

Right of one cojudgment debtor who pays judgment to be subrogated thereto as against the other cojudgment debtors, 157 A.L.R. 495.

Uniform Contribution Among Tortfeasors Act, 34 A.L.R.2d 1107.

Right of tort-feasor initially causing injury to recover indemnity or contribution from medical attendant causing new injury or aggravating injury in course of treatment, 8 A.L.R.3d 639.

Products liability: right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa, 28 A.L.R.3d 943.

Right of guarantor or surety, in order to avoid paying amount in excess of his proportionate share, to compel coguarantors or cosureties to pay their share to creditor, 38 A.L.R.3d 680.

Voluntary payment into court of judgment against one joint tort-feasor as release of others, 40 A.L.R.3d 1181.

Validity and effect of "loan receipt" agreement between injured party and one tort-feasor, for loan repayable to extent of injured party's recovery from a cotort-feasor, 62 A.L.R.3d 1111.

Propriety of direction of verdict in favor of fewer than all defendants at close of plaintiff's case, 82 A.L.R.3d 974.

Right of tort-feasor to contribution from joint tort-feasor who is spouse or otherwise in close familial relationship to injured party, 25 A.L.R.4th 1120.

Right of tortfeasor initially causing in-

jury to recover indemnity or contribution from medical attendant aggravating injury or causing new injury in course of treatment, 72 A.L.R.4th 231.

Release of one joint tortfeasor as discharging liability of others under Uniform Contribution Among Tortfeasors Act and other statutes expressly governing effect of release, 6 A.L.R.5th 883.

23-2-72. Apportionment of contract, rent, or hire.

Apportionment of a contract or of rent or hire may, from peculiar circumstances rendering the common-law remedy incomplete, become the subject of equitable jurisdiction.

History. — Orig. Code 1863, § 3067; Code 1868, § 3079; Code 1873, § 3134; Code 1882, § 3134; Civil Code 1895, § 3993; Civil Code 1910, § 4590; Code 1933, § 37-305.

JUDICIAL DECISIONS

Cited in Osborn v. Herron, 28 Ga. 313 (1859).

RESEARCH REFERENCES

C.J.S. — 18 C.J.S., Contribution, § 1 et seq.

ALR. — Right of owner of property to maintain bill for accounting against lien holder or pledgee, 79 A.L.R. 201.

Statute providing for apportionment between lessor and lessee of a tax imposed upon the producer of oil, gas, or other natural production as violation of the constitutional provision against impairment of the obligation of contracts, 160 A.L.R. 980.

Equity jurisdiction to determine valuation, where arbitration or appraisal has failed, under long-term lease providing for appraisal of premises and fixing rental value at stated intervals, 26 A.L.R.2d 744.

Validity, construction, and application of entirety clause in oil or gas lease, 48 A.L.R.3d 706.

23-2-73. Discharge of encumbrances affecting several interests.

Where several persons are interested in an estate as tenants for years, or for life, or in remainder or reversion, and encumbrances are to be discharged, the equitable division of the burden, according to the several interests, shall be a question for equitable interference.

History. — Orig. Code 1863, § 3066; Code 1868, § 3078; Code 1873, § 3133; Code 1882, § 3133; Civil Code 1895, § 3992; Civil Code 1910, § 4589; Code 1933, § 37-304.

JUDICIAL DECISIONS

Cited in Williams & Bessinger v. Foy Mfg. Co., 111 Ga. 856, 36 S.E. 927 (1900).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Equity, § 60.
ALR. — Right to contribution from remainderman, of life tenant who pays off encumbrance on property, 87 A.L.R. 220.

23-2-74. Burden of distinguishing mingled property.

If a party who has charge of the property of others shall so confound it with his own that the line of distinction cannot be drawn, all the inconvenience shall be thrown upon him who causes the confusion; and he shall distinguish his own property or lose it.

History. — Orig. Code 1863, § 3064; Code 1868, § 3076; Code 1873, § 3131; Code 1882, § 3131; Civil Code 1895, § 3990; Civil Code 1910, § 4587; Code 1933, § 37-302.

JUDICIAL DECISIONS

A guardian must keep separate account for his different wards to enable him to recover any advances made to any of them. Hudson v. Hawkins, 79 Ga. 274, 4 S.E. 682 (1887); English v. English, 149 Ga. 404, 100 S.E. 362 (1919).

Restitution restricted to traceable, unlawfully mingled fund. — When a bank, with notice that a fund is the sinking fund of a municipality, illegally receives such fund from the municipality in violation of Ga. L. 1910, p. 100, §§ 1, 2 (see O.C.G.A. § 36-38-1), and mingles the fund with the general cash assets of the bank, and shortly thereafter suspends operation and its business is taken in charge by the superintendent of banks (now commissioner of banking and finance) as an insolvent institution, the municipality may trace the trust fund and have restitution from the mingled fund, and any particular property in which the mingled fund may have been invested; but not in other funds of the bank. Town of Douglasville v. Mobley, 169 Ga. 53, 149 S.E. 575 (1929).

Procedure to reach trustee's interest of mingled fund. — When a trustee has so mingled the trust funds with the trustee's own estate that they cannot be distinguished, a cestui que trust may bring a complaint to reach the trustee's interest. Lathrop & Co. v. McBurney & Hollingsworth, 71 Ga. 815 (1883); Evans v. Pennington, 50 Ga. App. 146, 177 S.E. 357 (1934).

Effect of failure to distinguish confused funds. — Where an administrator sold as a unit and for a lump sum four parcels of land as to only two of which he has obtained an order from the court of ordinary (now probate court), the administrator in thus causing a confusion of funds brings upon himself and his security the burden of showing what proportion of the funds were derived from the sale of the other two parcels, in order to escape liability therefor; and, upon a failure to carry such burden they were held liable for the entire sum. American Sur. Co. v. Pettie, 178 Ga. 26, 171 S.E. 916 (1933).

Separation and distinguishment required when property sold and applied to creditor's indebtedness. — A factor with whom property has been deposited who, after having made advancements to the owner upon the property, sells a portion of the property during the owner's lifetime and applies the proceeds thereof upon the indebtedness, and sells the remainder of the property after the death of the owner, is entitled to the proceeds of the property sold before the death of the owner but, by reason of a claim of the widow and minor children of the owner to a year's support, is not entitled to the proceeds of the property sold after the death of the owner, and before he can assert his claim to the proceeds of the property to which he is entitled, he must

separate and distinguish them from the proceeds of the property sold after the death of the owner. Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204 (1933).

Allegations sufficient to support cause of action for accounting. — Petition alleging that the defendant, as agent, had exclusive control of the assets and handling of all of the affairs of two estates, that he used petitioner's individual money in the estate affairs and for his own use, that he wrongfully appropriated to his own use the estate funds and funds of petitioner, that he sold property, and never turned over the proceeds thereof, that he wrote checks on petitioner's personal account and used the proceeds for himself, that he kept all books and records pertaining to such transactions, and denied petitioner access to them, was sufficient to state a cause of action for accounting as against a general demurrer (now motion to dismiss). Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214 (1958).

Proof that expenses for repairs are authorized is necessary where a vendor retakes and resells property as agent of the purchaser, when he sues for the deficiency in proceeds. Hargett v. Muscogee Bank, 32 Ga. App. 701, 124 S.E. 541 (1924).

Cited in Liberty County Land & Lumber Co. v. Barnes, 77 Ga. 748, 1 S.E. 378 (1887); Claflin & Co. v. Continental Jersey Works, 85 Ga. 27, 11 S.E. 721 (1890); Finance Co. v. Lowery, 36 Ga. App. 337, 136 S.E. 475 (1927); Johnson v. King Lumber Co., 39 Ga. App. 280, 147 S.E. 142 (1929); Davis v. Wright, 194 Ga. 1, 21 S.E.2d 88 (1942); Southland Timber Corp. v. State Bank & Trust Co., 220 Ga. 307, 138 S.E.2d 585 (1964).

RESEARCH REFERENCES

ALR. — Law regarding confusion of goods as applied to live stock, 10 A.L.R. 765.

Right to protection against simulation of physical appearance or arrangement of place of business or vehicle, 28 A.L.R. 114.

Necessity and sufficiency of identification of goods sold as condition of avoidance of debtor's exemption against claim for purchase price, 150 A.L.R. 1329.

Confusion of goods by accident, mistake, or act of a third person, 39 A.L.R.2d 555.

23-2-75. Offer to pay balance unnecessary.

A petition for an accounting need not offer to pay a balance if found against the complainant.

History. — Orig. Code 1863, § 3069; Code 1868, § 3081; Code 1873, § 3136; Code 1882, § 3136; Civil Code 1895, § 3995; Civil Code 1910, § 4592; Code 1933, § 37-307.

JUDICIAL DECISIONS

The rule of this section applies to a petition filed for a general account and settlement of a copartnership. Wells v. Strange, 5 Ga. 22 (1848).

Rule of this section applies to a petition filed for settlement of an account by a legatee, or distributee. Echols v. Almon, 77 Ga. 330, 1 S.E. 269 (1886).

Cited in MacKenzie v. Flannery & Co., 90 Ga. 590, 16 S.E. 710 (1892); Marietta Realty & Dev. Co. v. Reynolds, 189 Ga. 147, 5 S.E.2d 347 (1939); Bibb County v. Winslett, 191 Ga. 860, 14 S.E.2d 108 (1941).

23-2-76. Equitable setoff.

Regarding a setoff, equity generally follows the law; but, if there is an intervening equity not reached by the law or if the setoff is of an equitable nature, equity shall take jurisdiction to enforce the setoff.

History. — Orig. Code 1863, § 3072; Code 1868, § 3084; Code 1873, § 3141; Code 1882, § 3141; Civil Code 1895, § 3996; Civil Code 1910, § 4593; Code 1933, § 37-308.

Cross references. — Setoff and recoupment generally, T. 13, C. 7.

Law reviews. — For survey article citing developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981).

JUDICIAL DECISIONS

Right of setoff did not originally exist at common law, and before the statutory provisions on setoff and recoupment (see O.C.G.A. § 13-7-1 et seq.) it was cognizable only in a court proceeding in equity. Robinson v. Lindsey, 184 Ga. 684, 192 S.E. 910 (1937).

The right to set off one legal demand against another, other than in cases covered by the statutory provisions on setoff and recoupment (see O.C.G.A. § 13-7-1 et seq.), is an equitable right, which is not and has never been recognized by a court of law in this state, except in obedience to a statute, and therefore it can be asserted only in a court having jurisdiction in equity matters. Quitman Cooperage Co. v. People's First Nat'l Bank, 178 Ga. 90, 172 S.E. 17 (1933); Gormley ex rel. Citizens Bank v. Chance, 55 Ga. App. 838, 191 S.E. 701 (1937); Autry v. Palmour, 124 Ga. App. 407, 184 S.E.2d 15 (1971).

Right of a court in this state to exercise equitable jurisdiction to enforce a setoff extends to cases where there is an intervening equity not reached by the law, or where the setoff is of an equitable nature. Quitman Cooperage Co. v. People's First Nat'l Bank, 178 Ga. 90, 182 S.E. 17 (1933).

Nonresidence of the plaintiff is an intervening equity. Gordy Tire Co. v. Dayton Rubber Co., 216 Ga. 83, 114 S.E.2d 529 (1960).

Insolvency is one of the intervening equities contemplated by this section. McLendon v. Galloway, 216 Ga. 261, 116 S.E.2d 208 (1960); Autry v. Palmour, 124 Ga. App. 407, 184 S.E.2d 15 (1971).

There are decisions that recognize that plaintiff's nonresidence alone will warrant the exercise of equitable jurisdiction. Aetna Ins. Co. v. Lunsford, 179 Ga. 716, 177 S.E. 727 (1934).

Pursuit of the remedy allowed by former Code 1933, § 108-501 (see O.C.G.A. § 53-12-150) did not make an "equity case" of which the Supreme Court had exclusive jurisdiction. Robinson v. Lindsey, 184 Ga. 684, 192 S.E. 910 (1937).

When superior court's equitable powers exercisable. — Where affirmative defense to action is beyond jurisdiction of city or county court in which it was filed, and plaintiff in that court is nonresident or insolvent so that failure to adjudicate counterclaim urged by original defendant along with main case could result in unfair advantage, superior court may exercise its equitable powers by enjoining suit originally filed and taking cognizance of entire controversy in a single action. Lester v. Goodyear Tire & Rubber Co., 156 Ga. App. 171, 274 S.E.2d 143 (1980).

When, neither nonresidence nor insolvency of original plaintiff is urged, and there is no showing either that such plaintiff corporation is nonresident or, if so, that it has no agent for service within state, no case has been made out for exercise of equity jurisdiction. Arnold v. Carter, 125 Ga. 319, 54 S.E. 177 (1906); Lester v. Goodyear Tire & Rubber Co., 156 Ga. App. 171, 274 S.E.2d 143 (1980).

Insolvency and nonresidence are not the sole grounds of equitable setoff; they are illustrative, but not all-comprehensive, of such grounds and an equitable setoff will be allowed, although the amount is small, and although the party may have a remedy at law, if to recover that small amount he is driven to many suits and to much trouble and expense. Quitman Cooperage Co. v. People's First Nat'l Bank, 178 Ga. 90, 172 S.E. 17 (1933).

Character of the demand does not determine the jurisdiction of the court to entertain the plea of setoff. Quitman Cooperage Co. v. People's First Nat'l Bank, 178 Ga. 90, 172 S.E. 17 (1933).

Setoff as not defeating plaintiff's claim, regardless of legal or equitable nature of setoff. — Existence of valid right of setoff does not operate to defeat plaintiff's claim, although it might preclude his recovery of any actual damages; and this is true regardless of the assertion of the setoff as a legal right or an equitable right. National City Bank v. Busbin, 175 Ga. App. 103, 332 S.E.2d 678 (1985); Gynecologic Oncology v. Weiser, 212 Ga. App. 858, 443 S.E.2d 526 (1994).

Equity may allow a setoff to prevent a multiplicity of suits. Burns v. Hill, 19 Ga. 22 (1855).

Damages arising ex delicto cannot be set off against a cause of action ex contractu, except upon equitable grounds. Such decisions, however, are based upon general equitable principles, and not upon statute. Harden v. Lang, 110 Ga. 392, 36 S.E. 100 (1900); Aetna Ins. Co. v. Lunsford, 179 Ga. 716, 177 S.E. 727 (1934); McLendon v. Galloway, 216 Ga. 261, 116 S.E.2d 208 (1960).

Where petitioner, a nonresident railroad, brought an action ex contractu against a resident of this state for the collection of freight charges owing the petitioner, and by counterclaim the defendant set off an action ex delicto for negligence, a court of equity will take jurisdiction thereof, under this section, and the Supreme Court has jurisdiction of the writ of error (see O.C.G.A. §§ 5-6-49, 5-6-50) from the lower court. Atlanta Paper Co. v. New York, New Haven & Hartford R.R., 211 Ga. 185, 84 S.E.2d 359 (1954).

Except, under the Civil Procedure Act, O.C.G.A. § 9-11-1 et seq., an ex delicto counterclaim may be asserted against an ex contractu action. Ben L. O'Callaghan Co. v. Bond Supply Co., 138 Ga. App. 186, 225 S.E.2d 774 (1976).

Setoff not allowed. — To an action ex contractu damages sounding in tort cannot be pleaded in defense, where neither the insolvency nor nonresidence of the plaintiff is set up. Berry v. Brunson, 166 Ga. 523, 143 S.E. 761 (1928).

Setoff improper. — Trial court erred in ruling for a development company in the company's declaratory judgment action seeking to have the company's debt to a bank set off against the company's loan to a holding company because the bank and the holding company were separate entities; the development company knew the risks involved when the company made the holding company loan, and the bank could not obtain relief unavailable to any other entities who lent money to the holding company simply because the company borrowed money from the bank years ago. Bank of the Ozarks v. DKK Dev. Co., 315 Ga. App. 539, 726 S.E.2d 608 (2012).

Voluntary rent provision and debt payment. — Defendant's claim that she satisfied her debt on a promissory note owed to her spouse by providing her mother-in-law with a rent-free apartment and by paying certain debts that spouse owed to certain creditors was to no avail as it was done under a mere volunteer arrangement with no outstanding obligations to do so. United States v. Speir, 808 F. Supp. 829 (S.D. Ga. 1992).

City court has no jurisdiction whatever to entertain a plea setting up an equitable setoff, or an equitable right of setoff, for the simple reason that to entertain such a plea it is necessary for the court, not only to recognize an equitable right, but to give affirmative relief as a result of such recognition. Jones v. George S. Riley, Jr. Co., 14 Ga. App. 84, 80 S.E. 341 (1913); Gormley ex rel. Citizens Bank v. Chance, 55 Ga. App. 838, 191 S.E. 701 (1937).

Setoff was permitted on debt of deceased husband against a note held by his wife. Harwood v. Andrews, 71 Ga. 784 (1883).

By former Civil Code 1895, § 3755 (see O.C.G.A. § 13-7-11), debts not due may be setoff when the plaintiff resides outside the state, or is insolvent. Hecht v. Snook & Austin Furn. Co., 114 Ga. 921, 41 S.E. 74 (1902); Metcalf v. People's Grocery Co., 24 Ga. App. 663, 101 S.E. 768 (1920).

Accommodation maker of note to corporation could set off liability of its organizers before capital subscribed. Crandall v. Shepard, 166 Ga. 396, 143 S.E. 587 (1928).

Setoff was not permitted on a debt of a partner against a debt due the firm. Metcalf v. People's Grocery Co., 24 Ga. App. 663, 101 S.E. 768 (1920).

After an employee had been wrongfully and unlawfully discharged, the employer must pay all of the employee's pay and allowances up until, and including day of discharge minus compensation of other concurrent work. Russell v. Hughes, 244 Ga. 634, 261 S.E.2d 584 (1979).

Discharged servant is bound to use due diligence to prevent the loss from being more than necessary, and to that end must seek employment in similar business and derive such income from it as he reasonably can, which is to be deducted in fixing the damage to be recovered; the burden, however, of showing that he did obtain employment, or could have obtained it by due diligence, is on the other party. Russell v. Hughes, 244 Ga. 634, 261 S.E.2d 584 (1979).

Employer's liability for wages of wrongfully discharged employee mitigated by subsequent earnings. — When in an unlawful discharge case, plaintiff was engaged in the real estate appraisal business on a part time basis prior to the plaintiff's discharge and after the plaintiff's discharge devoted the plaintiff's full time to these efforts, any increase in earnings should be in mitigation of the county's liability to plaintiff. Russell v. Hughes, 244 Ga. 634, 261 S.E.2d 584 (1979).

Right to setoff may be waived. — See Solid Waste Mgmt. Auth. v. Transwaste Servs., 247 Ga. App. 29, 543 S.E.2d 98 (2000).

Cited in Mills v. Lumpkin, 1 Ga. 511, 44 Am. Dec. 677 (1846); Jordan v. Jordan, 12 Ga. 77 (1852); Barnes v. Shinholster, 14 Ga. 131 (1853); Lee v. Lee, 31 Ga. 26, 76 Am. Dec. 296 (1861); Moody v. Ellervie, 36 Ga. 666 (1867); Mordecai v. Stewart, 37 Ga. 364 (1867); Hecht v. Snook & Austin Furn. Co., 114 Ga. 921, 41 S.E. 74 (1901); Harris v. Gano, 117 Ga. 934, 44 S.E. 11 (1903); Geer v. Cowart, 5 Ga. App. 251, 62 S.E. 1054 (1908); Scaffold v. Evans, 146 Ga. 180, 91 S.E. 21 (1916); Bellah v. Cleghorn, 165 Ga. 494, 141 S.E. 311 (1928); Quitman Cooperage Co. v. People's First Nat'l Bank, 178 Ga. 90, 172 S.E. 17 (1933); Shepard v. Veal, 178 Ga. 535, 173 S.E. 644 (1934); Attaway v. Attaway, 193 Ga. 51, 17 S.E.2d 72 (1941); Jacksonville Paper Co. v. Owen, 193 Ga. 23, 17 S.E.2d 76 (1941); Nixon v. Nixon, 194 Ga. 301, 21 S.E.2d 702 (1942); Mathis v. Lathrop's Hatchery, Inc., 211 Ga. 320, 85 S.E.2d 764 (1955); Bugden v. Bugden, 226 Ga. 362, 174 S.E.2d 922 (1970); Pickett v. Chamblee Constr. Co., 124 Ga. App. 769, 186 S.E.2d 123 (1971); Glen Oak, Inc. v. Henderson, 258 Ga. 455, 369 S.E.2d 736 (1988); Kruse v. Todd, 260 Ga. 63, 389 S.E.2d 488 (1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, § 11.

C.J.S. — 80 C.J.S., Set-Off and Counterclaim, § 6 et seq.

ALR. — Right to setoff deposit in insolvent bank against indebtedness to bank, 25 A.L.R. 938; 82 A.L.R. 665; 97 A.L.R. 588.

Immaturity of claim against insolvent at time of insolvency proceedings as affecting right of setoff, 51 A.L.R. 1477.

Equitable set-off of claim of one person and claim of his debtor against another, 93 A.L.R. 1164.

Right of endorser of commercial paper to set off amount which he is obliged to pay thereon against independent indebtedness to insolvent maker or other person antecedently liable, where debt is assigned after making but prior to maturity of paper, 117 A.L.R. 900.

Cotenant's right to contribution in re-

spect of taxes, improvements, or repairs as subject to reduction on account of rents and profits for which he is not otherwise responsible, 136 A.L.R. 1022.

Fractional interest in debt as subject of setoff, 139 A.L.R. 1328.

Equitable relief where one against whom judgment has been recovered in an action in a court of limited jurisdiction has a claim against the judgment creditor which would have been available as a setoff in such action apart from fact that it was in excess of the court's jurisdiction, 147 A.L.R. 513.

Remedy available against invalid judgment in favor of United States, state, or other governmental unit immune to suit, 163 A.L.R. 244.

Right of attorney to set off claim for unrelated services against client's claim for money collected, 173 A.L.R. 429.

Claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill, or cross action, 1 A.L.R.2d 630.

Right of trespasser to credit for expenditures in producing, as against his liability for value of, oil or minerals, 21 A.L.R.2d 380.

Husband's right to set off wife's debt against alimony or child support payments, 100 A.L.R.2d 925.

Modern status of law regarding solicitation of business by or for attorney, 5 A.L.R.4th 866.

Spouse's right to set off debt owed by other spouse against accrued spousal or child support payments, 11 A.L.R.5th 259.

ARTICLE 5

ADMINISTRATION OF ASSETS GENERALLY

23-2-90. Legal and equitable assets defined; rules of distribution.

(a) Assets are either legal or equitable. Legal assets are such as may be reached by the ordinary process of law. Equitable assets are such as can be reached only through the intervention of equity.

(b) Legal assets, when properly before the court, shall be distributed according to legal liens and priorities. Equitable assets shall be distributed according to justice and right in the particular case, the general rule being that equality is equity.

(c) Sometimes assets are partly legal and partly equitable. In such cases, while the above rule shall be adhered to as to the legal assets, equity shall so administer the equitable assets as to produce general equality.

History. — Orig. Code 1863, §§ 3073, 3074; Code 1868, §§ 3085, 3086; Code 1873, §§ 3142, 3143; Code 1882, §§ 3142, 3143; Civil Code 1895, §§ 3997, 3998; Civil Code 1910, §§ 4594, 4595; Code 1933, §§ 37-401, 37-402.

JUDICIAL DECISIONS

A court of equity has concurrent jurisdiction with the ordinary (now probate judge) over the settlement of accounts of administrators and executors; and the court first taking jurisdiction will retain it. Terry v. Chandler, 172 Ga. 715, 158 S.E. 572 (1931).

Life estate of a cestui que trust is an equitable asset. Cruger v. Coleman & Newsome, 75 Ga. 695 (1885). See Patter-

son & Co. v. Lawrence, 83 Ga. 703, 10 S.E. 355 (1889).

Mortgagee of a railroad has a superior claim to the assets than a creditor who owns all of the stock. Exchange Bank v. Macon Constr. Co., 97 Ga. 1, 25 S.E. 326, 33 L.R.A. 800 (1895).

When appointment of receiver by judgment creditor sanctioned. — When a debt secured by a deed to secure debt, is interest bearing and not due, and a redemption under former Code 1933, §§ 39-201 and 39-202 (see O.C.G.A. § 9-13-60) will cause the judgment creditor to lose a substantial sum approximating the amount of the unearned interest, the debtor having no other property from which to satisfy the judgment, a subsequent judgment creditor may proceed in equity for the appointment of a receiver for the purpose of selling the property subject to the principal of the debt and accrued interest. Cook v. Securities Inv. Co., 184 Ga. 544, 192 S.E. 179 (1937).

Cited in Robinson v. Bank of Darien, 18 Ga. 65 (1855); Stinson v. Williams, 35 Ga. 170 (1866); Gamble v. Cent. R.R. & Banking Co., 80 Ga. 595, 7 S.E. 315, 12 Am. St. R. 276 (1888); Nash v. Cowart, 162 Ga. 236, 133 S.E. 263 (1926); Bryant v. Bush, 165 Ga. 252, 140 S.E. 366 (1927); Bryan v. Bryan, 170 Ga. 472, 153 S.E. 188 (1930); Rose v. Crane Heating Co., 198 Ga. 295, 31 S.E.2d 717 (1944); Routon v. Woodbury Banking Co., 209 Ga. 706, 75 S.E.2d 561 (1953).

RESEARCH REFERENCES

ALR. — By whom writ of assistance issued, 21 A.L.R. 358.

Right of creditor to interest after bankruptcy, declared insolvency, or appointment of receiver, where assets are more than sufficient to pay the principal of all claims, 39 A.L.R. 457; 44 A.L.R. 1170.

Sale in inverse order of alienation, 131 A.L.R. 4.

23-2-91. When equity will interfere with administration of estates.

Equity will not interfere with the regular administration of estates, except upon:

(1) Application of the representative:

(A) For construction and direction; or

(B) For marshaling the assets; or

(2) Application of any person interested in the estate where there is danger of loss or other injury to his interests.

History. — Orig. Code 1863, § 3075; Code 1868, § 3087; Code 1873, § 3144; Code 1882, § 3144; Civil Code 1895, § 3999; Civil Code 1910, § 4596; Code 1933, § 37-403.

Law reviews. — For article, "Fiduciary Problems of the Executor and Trustee: Conflicts of Interest, Violations of Fiduciary Duties; Surcharge, and Other Remedies of Beneficiaries," see 9 Ga. St. B.J. 187 (1972). For survey article on wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 58 Mercer L. Rev. 423 (2006). For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007).

JUDICIAL DECISIONS

Analysis

General Consideration
Application of Representative
Danger of Loss or Other Injury

General Consideration

This section refers to an action to regulate administrations. It has no reference to withdrawing the administration altogether from the court of ordinary (now probate court) in order that a superior court may administer the estate, except where the administration in the court of ordinary (now probate court) originated in fraud or is being fraudulently exercised. Jones v. Head, 185 Ga. 857, 196 S.E. 725 (1938).

This section states the general rule that equity will not interfere with the administration of assets, since the court of ordinary (now probate court) has jurisdiction. Morrisson v. McFarland, 147 Ga. 465, 94 S.E. 569 (1917); McKinney v. Powell, 149 Ga. 422, 100 S.E. 375 (1919).

When remedies at law inadequate equity jurisdiction exercisable. — Trial court's denial of a petition brought by heirs of a decedent's estate seeking partition and sale of estate property by a special master was affirmed where the trial court found that the interests of the heirs were adequately protected in the probate court so that the intervention of equity was not warranted; the heirs failed to meet their obligation of demonstrating a strong reason for the intervention of equity into the administration of the estate. Dawson v. Dawson, 277 Ga. 850, 597 S.E.2d 114 (2004).

Superior courts have jurisdiction over construction of wills. National Audubon Soc'y, Inc. v. Marshall, 424 F.2d 717 (5th Cir. 1970).

Proceeding against administrator, etc., for settlement of estate not interference with regular administration of estate. — A proceeding brought against an administrator or executor for a settlement by an heir at law or legatee is not such interference with the regular administration of estates as is denounced by this section. The jurisdiction of a court of ordinary (now probate court) and a superior court in respect to bringing proceedings for an account and settlement is co-ordinate and equal, and has always been so in this state. The jurisdiction conferred upon the court of ordinary (now probate court) in the management and distribution of estates does not oust the jurisdiction of equity in matters of settlement. Terry v. Chandler, 172 Ga. 715, 158 S.E. 572 (1931); Stroup v. Imes, 185 Ga. 422, 195 S.E. 411 (1938); Robinson v. Georgia Sav. Bank & Trust Co., 185 Ga. 688, 196 S.E. 395 (1938); Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706 (1943).

Court first taking jurisdiction will "retain it, unless a good reason shall be given for the interference of equity." Robinson v. Georgia Sav. Bank & Trust Co., 185 Ga. 688, 196 S.E. 395 (1938); Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706 (1943).

Evidence necessary for court to replace administrator or executor with receiver. — A superior court will not interfere with the regular course of an administrator, by appointing a receiver to take the assets of the estate out of the hands of the administrator, unless the danger is imminent and the charges in the complaint are positive and specific. Griner v. Wilson, 181 Ga. 432, 182 S.E. 592 (1935); Furr v. Jordan, 196 Ga. 862, 27 S.E.2d 861 (1943); Salter v. Salter, 209 Ga. 511, 74 S.E.2d 241 (1953); Rainey v. Woodcock, 211 Ga. 101, 84 S.E.2d 41 (1954); Marlowe v. Moss, 212 Ga. 781, 95 S.E.2d 796 (1956).

When accounting premature equitable jurisdiction not sustainable on showing imminent danger of loss. — While it would now appear that there are decisions holding that ordinarily an equitable petition for an accounting against an administrator may be maintained without the necessity of showing imminent danger of loss, where it does not appear that the court of ordinary (now probate court) has already assumed jurisdiction for the pur-

pose of an accounting, this rule will not be extended to a case which shows plainly that an accounting would be premature. Hoffman v. Chester, 204 Ga. 296, 49 S.E.2d 760 (1948).

Full protection of rights of parties in interest compels interference by courts. — Superior courts are loath to interfere in the administration of estates; but having concurrent jurisdiction with the court of ordinary (now probate court) in the settlement of accounts, they will not hesitate to interfere for the full protection of the rights of parties in interest. Hamrick v. Prewett, 174 Ga. 895, 164 S.E. 678 (1932); Jones v. Proctor, 195 Ga. 607, 24 S.E.2d 779 (1943); Spence v. Brown, 198 Ga. 566, 32 S.E.2d 297 (1944).

To authorize interference the facts must clearly show there is a good reason for so doing. Gaines v. Gaines, 171 Ga. 169, 154 S.E. 883 (1930); Griner v. Wilson, 181 Ga. 432, 182 S.E. 592 (1935); Butler v. Floyd, 184 Ga. 447, 191 S.E. 460 (1937); Furr v. Jordan, 196 Ga. 862, 27 S.E.2d 861 (1943); Spence v. Brown, 198 Ga. 566, 32 S.E.2d 297 (1944); Saliba v. Saliba, 201 Ga. 681, 40 S.E.2d 732 (1946); Marlowe v. Moss, 212 Ga. 781, 95 S.E.2d 796 (1956).

Equity jurisdiction not available because adequate legal remedy. — Where devisee brings equitable complaint against coexecutors of an estate, seeking a partition of the property of the estate through a sale by the receiver, and alleging that more than 20 years had elapsed since the executors had qualified, that all the debts of the estate had been paid, and that executors were in possession of all real and personal property belonging to the estate, the allegations are insufficient to authorize the grant of the prayers for equitable complaint between the devisees because plaintiff devisee has a full and adequate remedy under the law in the court of ordinary (now probate court) to require executors to distribute the estate by division or partition. Salter v. Salter, 209 Ga. 511, 74 S.E.2d 241 (1953).

Effect of absence of showing that executor not amenable to future order of probate judge. — An injunction will not lie against real estate agents joined as parties defendant for diversion of rent from property devised to the plaintiffs by the testator in the absence of any showing that the executor is not amenable to and cannot be made to respond to any future order of the ordinary (now probate court judge) holding him responsible, since no reason would appear to disturb the orderly procedure of the court having and exercising jurisdiction. Bowen v. Bowen, 200 Ga. 572, 37 S.E.2d 797 (1946).

Jurisdiction of superior court based on indirect consent of defendants. — By consenting to the continuation of a temporary restraining order and to a consent order, defendants consented to an injunction against themselves, thereby at least temporarily conceding that the superior court had jurisdiction, i.e., that plaintiffs had no adequate remedy at law. Vowell v. Carmichael, 235 Ga. 387, 219 S.E.2d 732 (1975).

Defense of adequate remedy at law waivable unless timely raised. — The defense available in equity that the complainant has an adequate remedy at law must be raised before the decree is entered; otherwise, this defense is waivable. Vowell v. Carmichael, 235 Ga. 387, 219 S.E.2d 732 (1975).

Pleading clear prima facie case required. — When a party comes into a superior court to ask its assistance in accordance with this section, he must state a clear prima facie case. Mills v. Lumpkin, 1 Ga. 511, 44 Am. Dec. 665 (1846); Powell v. Quinn, 49 Ga. 523 (1873); Hobby v. Ford, 149 Ga. 176, 99 S.E. 624 (1919).

Complaint not filed in good faith subject to dismissal. — Complaint by a legatee alleging that the application for administration pending before the ordinary (now probate judge), was not filed in good faith, will be dismissed. McArthur v. Jordan, 139 Ga. 304, 77 S.E. 150 (1913).

Complaint will be dismissed where it merely alleges that the administrator has paid an improper item, when removal of the administrator is pending before the ordinary (now probate judge). Gibbs v. Gibbs, 151 Ga. 745, 108 S.E. 214 (1921).

Effect of disqualification of judge. — Where, the superior court judge of a judicial circuit has become disqualified,

General Consideration (Cont'd)

any other superior court judge of the state may grant the relief in equity provided by this section. Jennings v. Smith, 232 F. 921 (S.D. Ga.), rev'd on other grounds, 238 F. 48 (5th Cir. 1916), cert. denied, 243 U.S. 635, 37 S. Ct. 399, 61 L. Ed. 940 (1917).

A property holder has no right to have a will construed. Hopkins v. Vance, 153 Ga. 754, 113 S.E. 157 (1922).

Property holder's intervening equities will be protected. DeVane v. DeVane, 149 Ga. 783, 102 S.E. 145 (1920).

Collateral heirs of an estate may enjoin administration of an estate by the insolvent wife of the decedent where she is a bigamist and her marriage was procured by fraud. Crawford v. Crawford, 139 Ga. 535, 77 S.E. 826 (1913).

Remainderman may compel an administrator to convey land devised to the former, which the latter claims is part of the estate. Goza v. Steele, 158 Ga. 97, 122 S.E. 607 (1924).

Receiver may be appointed, and injunction granted, pending the determination of the legitimacy of a child legatee. Clay v. Coggins, 148 Ga. 543, 97 S.E. 623 (1918); Sawyer v. Herrington, 156 Ga. 776, 120 S.E. 416 (1923).

When a receiver absconds, relief will be granted. Morris v. Moseley, 160 Ga. 536, 128 S.E. 753 (1925).

Effect of failure to show necessity of receivership. — No matter how strong the apparent equity of the complainant may be, if there is no necessity for a receivership the courts will not change the status until final decree. Jue v. Joe, 207 Ga. 119, 60 S.E.2d 442 (1950).

Construction of a will may be invoked by a devisee or legatee as a basis for recovery of the devised or bequeathed property. Clay v. Clay, 149 Ga. 725, 101 S.E. 793 (1920); Jackson v. Callahan, 152 Ga. 236, 109 S.E. 499 (1921).

Equity will compel the executor to account to the legatee. Clements v. Fletcher, 154 Ga. 386, 114 S.E. 637 (1922).

A judgment creditor may have a receiver appointed to prevent a misapplication of the assets. Dougherty v. McDougald, 10 Ga. 121 (1859).

Right of executor to extra compensation. — Where, under an equitable petition by one legatee, a receiver has been appointed, the executor may make application to be allowed extra compensation. Adair v. St. Amand, 136 Ga. 1, 70 S.E. 578 (1911).

When award on arbitration upheld. — When there is no allegation of insolvency on the part of the administratrix, or that the heirs are not amply protected by an administrator's bond, a superior court exercising equitable jurisdiction will not interfere with an award on arbitration between a creditor and the administrator. Walton v. Reid, 148 Ga. 176, 96 S.E. 214 (1918).

Equity will specifically enforce a parol agreement entered into between two persons, by the terms of which one is to perform certain services during the lifetime of the other, and the latter is to convey certain land at or before his death in consideration of such services. Whitmire v. Watkins, 245 Ga. 713, 267 S.E.2d 6 (1980).

Cited in Dean v. Central Cotton Press Co., 64 Ga. 670 (1880); Brown v. Benson, 101 Ga. 753, 29 S.E. 215 (1897); Spooner v. Bank of Donalsonville, 159 Ga. 295, 125 S.E. 456 (1924); Spooner v. Bank of Donalsonville, 159 Ga. 748, 126 S.E. 722 (1925); Bryan v. Bryan, 170 Ga. 472, 153 S.E. 188 (1930); Evans v. Pennington, 177 Ga. 56, 169 S.E. 349 (1933); Caswell v. Caswell, 177 Ga. 153, 169 S.E. 748 (1933); Reece v. McCrary, 179 Ga. 812, 177 S.E. 741 (1934); Jenkins v. Elliott, 180 Ga. 303, 178 S.E. 702 (1935); Pattison v. Farkas, 180 Ga. 798, 180 S.E. 831 (1935); Kemp v. Trust Co., 182 Ga. 884, 187 S.E. 75 (1936); Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939); Beecher v. Carter, 189 Ga. 234, 5 S.E.2d 648 (1939); Smith v. Pitchford, 189 Ga. 307, 5 S.E.2d 766 (1939); Wilcox v. Thomas, 191 Ga. 319, 12 S.E.2d 343 (1940); Bacon v. Federal Land Bank, 109 F.2d 285 (5th Cir. 1940); McCord v. Walton, 192 Ga. 279, 14 S.E.2d 723 (1941); White v. Glasgow, 193 Ga. 609, 19 S.E.2d 305 (1942); Astin v. Carden, 194 Ga. 758, 22 S.E.2d 481 (1942); Kelley v. Cromer, 201 Ga. 375, 39 S.E.2d 880 (1946); Toler v. Goodin, 74 Ga. App. 468, 40 S.E.2d 214 (1946); Mitchell v. Mitchell, 201 Ga. 621,

40 S.E.2d 738 (1946); Armstrong v. Merts, 202 Ga. 483, 43 S.E.2d 512 (1947); Hoffman v. Chester, 204 Ga. 296, 49 S.E.2d 760 (1948); Stahl v. Russell, 206 Ga. 699, 58 S.E.2d 135 (1950); Mandeville v. Mandeville, 207 Ga. 125, 60 S.E.2d 460 (1950); Ware v. Martin, 207 Ga. 512, 63 S.E.2d 335 (1951); Montgomery v. Pierce, 212 Ga. 545, 93 S.E.2d 758 (1956); Wilkinson v. First Nat'l Bank & Trust Co., 217 Ga. 540, 123 S.E.2d 722 (1962); Estes v. First Nat'l Bank, 223 Ga. 653, 157 S.E.2d 449 (1967); Williams v. Cowan, 226 Ga. 319, 174 S.E.2d 789 (1970); Underwood v. Mackendree, 242 Ga. 666, 251 S.E.2d 264 (1978); Moore v. Lindsey, 662 F.2d 354 (5th Cir. 1981); Powell v. Thorsen, 248 Ga. 697, 285 S.E.2d 699 (1982); Taylor v. Mosley, 252 Ga. 325, 314 S.E.2d 184 (1984); Jenkins v. Finch, 257 Ga. 276, 357 S.E.2d 587 (1987); Getman v. Ackerly, 259 Ga. 534, 384 S.E.2d 651 (1989); Brown v. Cronic, 266 Ga. 779, 470 S.E.2d 682 (1996); Levenson v. Word, 286 Ga. 114, 686 S.E.2d 236 (2009).

Application of Representative

General rule is that only the legal representative of an estate may apply to a court of equitable jurisdiction for direction or construction of a will. The only exception to this rule is upon application of a person interested in the estate where there is danger of loss or other injury to his interest. Campbell v. Trust Co., 197 Ga. 37, 28 S.E.2d 471 (1943).

Only the representative of the estate may seek the direction of a court for the construction of a will. Taylor v. Taylor, 205 Ga. 483, 53 S.E.2d 769 (1949).

Court in a proper case might entertain a suit by executors for direction, and still appoint receivers to execute directions given therein; the two powers of the court are given equal recognition in the Code, and are not antagonistic, but are coordinate and consistent. Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939).

Executor is entitled to the direction of the courts of Georgia and to the aid of equity in the settlement of his accounts in the performance of his duties and the fulfillment of his oath if a proper case for same is alleged. Georgia Money Corp. v. Rissman, 220 Ga. 476, 139 S.E.2d 486 (1964).

Allegation necessary when seeking construction of a will. — An action seeking recovery of property devised by a will, in which a construction of the will is sought as a basis for such recovery, is not maintainable in equity, where it is not alleged that the executor has assented to the devise or wrongfully refuses to assent. Taylor v. Taylor, 205 Ga. 483, 53 S.E.2d 769 (1949).

Legatee or devisee cannot under normal circumstances maintain a complaint for construction of a will, since that is the duty and prerogative of the executor yet, the right of a legatee or devisee, under stated circumstances, to seek and obtain construction is recognized. Brewton v. McLeod, 216 Ga. 686, 119 S.E.2d 105 (1961); Lowell v. Bouchillon, 246 Ga. 357, 271 S.E.2d 498 (1980).

Superior court will not obstruct the orderly procedure of an application for year's support before the judge of the probate court, by assuming jurisdiction under the guise of construing the will; especially where the executor, who is the only proper party for a petition for construction, is not the plaintiff in the petition, but is named as a party defendant by legatees under the will. Bowen v. Bowen, 200 Ga. 572, 37 S.E.2d 797 (1946).

Allegations by legatee sufficient to show necessity for construction and direction. — Where legatee sought by her complaint and was entitled to injunctive relief against the executor to prevent a premature distribution of the assets of the estate contrary to the directions of the will, and alleged that the executor had misconstrued the will, legatee's petition showed such interest by the legatee in the estate and such necessity for construction of the will and direction by the court to protect her distributive share and legacy as would authorize her to bring the action. Barfield v. Aiken, 209 Ga. 483, 74 S.E.2d 100 (1953).

Determining ownership of bank deposit not same as construction of a will. — When a suit was brought by an executor against the wife of the deceased, for the purpose of determining the owner-

Application of Representative (Cont'd)

ship of money on deposit in a bank, the construction of the will was not involved, and the allegations and prayers of the complaint would not meet the provisions of former Code 1933, § 37-404 (see now O.C.G.A. § 23-2-92), for marshaling assets or for any other equitable relief. Trust Co. v. Fauss, 195 Ga. 611, 24 S.E.2d 799 (1943).

Equitable interference not available to remainderman when life tenant still in life. — Where the only title which, under the complaint could inure to claimants by virtue of the wills of third persons consisted of an alleged remainder interest after the death of a person still in life, and they would have no cause of action to recover the property before the death of such life tenant, this section governing equitable interference with the administration of estates does not authorize an action. Smith v. Pitchford, 189 Ga. 307, 5 S.E.2d 766 (1939).

Executor's uncertainty justified declaratory judgment action. — Executor of the estate and partnership head faced uncertainty with respect to conflicting duties to the partnership and to the estate and beneficiaries; thus, a declaratory judgment was an appropriate vehicle to clarify the executor's obligations, and the Georgia superior court had concurrent jurisdiction with the probate court to address those issues as well as was authorized to exercise the court's concurrent and equitable jurisdiction to decide the requests for the temporary restraining orders. Rentz v. Rentz, 339 Ga. App. 66, 793 S.E.2d 112 (2016).

Danger of Loss or Other Injury

Superior court will not interfere with the regular administration of estates at the instance of an heir except where there is danger of loss or other injury to his interest. Gill v. Gill, 211 Ga. 567, 87 S.E.2d 389 (1955).

Standing. — Under O.C.G.A. § 23-2-91(2), two children, as heirs at law, had a right to petition the trial court for an interlocutory injunction to protect potential assets of the estate pending the outcome of the children's case against an executrix challenging an alleged gift made by the decedent hours before death since the trial court could be involved in matters relating to the administration of a decedent's estate if equitable interference was required for the complete protection of parties' rights; "interest in the estate" included equitable redress in the trial court when adequate relief was otherwise unavailable. Johns v. Morgan, 281 Ga. 51, 635 S.E.2d 753 (2006).

Upon application of any person interested in the estate, where there is danger of loss or other injury to his interest, a superior court will entertain jurisdiction. Lefkoff v. Sicro, 189 Ga. 554, 6 S.E.2d 687 (1939); Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706 (1943); Conner v. Yawn, 200 Ga. 500, 37 S.E.2d 541 (1946); Taylor v. Taylor, 205 Ga. 483, 53 S.E.2d 769 (1949).

Person may not seek intervention of equity as a means of wrenching administration of the estate from the jurisdiction of the court of ordinary (now probate court). Jones v. Head, 185 Ga. 857, 196 S.E. 725 (1938); Conner v. Yawn, 200 Ga. 500, 37 S.E.2d 541 (1946).

Fact that an executor is serving without bond is insufficient to show a danger of loss or injury in the absence of interference by a court of equity. Taylor v. Taylor, 205 Ga. 483, 53 S.E.2d 769 (1949); Fuller v. Fuller, 217 Ga. 691, 124 S.E.2d 741 (1962).

Actions outside scope of equitable jurisdiction of courts. — The superior courts are not ordinarily empowered on equitable complaint to set aside a previous probate of a will by a court of ordinary (now probate court), or to pass upon the validity of a will, or to interfere with due administration already in progress in a court of ordinary, or to do more than determine the legality or proper construction of particular legacies. Abercrombie v. Hair, 185 Ga. 728, 196 S.E. 447 (1938).

One clear exception to this section is when fraud has been or is being committed by the executor. In such cases it is deemed that the only complete and adequate remedy to which the heirs, legatees, or devisees may be entitled can only be afforded by a court exercising

equitable jurisdiction. King v. King, 225 Ga. 142, 166 S.E.2d 347 (1969).

When a legatee alleges fraud, and seeks cancellation and rescission of a deed executed by the defendant executor conveying property belonging to the estate to the executor's wife, the superior court is authorized to take necessary action for the complete and just administration of the estate in one action. King v. King, 225 Ga. 142, 166 S.E.2d 347 (1969).

Proof of fraud needed for superior court to set aside judgment of probate court. — However, "the judgment of a court of competent jurisdiction may be set aside by a decree in equity, for fraud, accident, or mistake." The fraud in the procurement of such a judgment must have been actual and positive, done with knowledge, and not merely constructive fraud, committed in ignorance of the true facts. Thus a superior court may set aside as void a judgment of the court of ordinary (now probate court) appointing an administrator where "an allegation of fact in a petition of the court of ordinary (now probate court), which was necessary to give the court jurisdiction, was known by the petitioner to be false, and therefore was fraud upon the court." Abercrombie v. Hair, 185 Ga. 728, 196 S.E. 447 (1938).

Waste, mismanagement and insolvency of bondless executor sufficient for grant of equitable relief. — Where the plaintiff, a distributee of an estate in the hands of an executor alleged to be insolvent and without bond, alleges facts which show waste and mismanagement, and a situation is presented where he would be remediless unless granted the relief which a superior court alone can grant, he is a party interested in the estate, and alleges facts showing danger of loss, thus bringing himself within the exception mentioned in this section. Walters v. Suarez, 188 Ga. 190, 3 S.E.2d 575 (1939).

Limited use of paragraph (2) exception. — Paragraph (2) of this section is not intended, in the absence of any allegation of fraud, to supply a means of reviewing a judgment of the court of ordinary (now probate court) in the administration of an estate of which it has assumed jurisdiction, or of ousting the jurisdiction of the court of ordinary (now probate court). Darby v. Green, 174 Ga. 146, 162 S.E. 493 (1932).

If an insolvent executor in charge of real estate which includes houses which need repairs, no matter however small, and he, being without sufficient funds to make them, fails to do so, and on this account the property is deteriorating, the persons to whom the property has been devised are entitled to have the same protected, and the appointment of a receiver with directions to him to have the repairs made, seems not to be an inappropriate remedy. Jones v. Proctor, 195 Ga. 607, 24 S.E.2d 779 (1943).

Action alleging denial of information needed by widow for determining to take under will or by election maintainable in equity. — Where wife of the deceased testator alleges that the executor refuses to give her any information concerning the money or property belonging to the estate, which information she must have in order to determine the question whether or not to accept a bequest contained in the will in lieu of dower and a year's support, widow was a "person interested in the estate" and entitled to maintain action in equity against executor. Jackson v. Jackson, 206 Ga. 470, 57 S.E.2d 602 (1950).

When minor children of testator participate in the residue of the estate after specific bequests have been satisfied, and all persons provided for in the will with the exception of the children were granted their legacies in the probate court, children qualified under statute as "person interested in estate," and were entitled to appointment of receiver to restrain executor and others from disposing of estate property. Jackson v. Jackson, 206 Ga. 470, 57 S.E.2d 602 (1950).

Absent complaint from estate representative proof needed to sustain complaint of persons interested in estate. — This provision requires a determination of whether plaintiffs, as persons interested in the estate because they are parties to a testamentary agreement, made sufficient allegations as to "danger of loss or other injury to their interests" when there is no application from the representative. Fuller v. Fuller, 217 Ga.

Danger of Loss or Other Injury (Cont'd)

691, 124 S.E.2d 741 (1962).

When the interested party's allegations amount to apprehension of injury, this has been held insufficient as a basis for injunction and interference with administration of estates. Fuller v. Fuller, 217 Ga. 691, 124 S.E.2d 741 (1962).

Preventing irreparable injury to estate sufficient ground for intervention by superior court. — Where complainant did not seek removal of the defendant as an executor under § 53-7-32, nor that he be required to make bond under § 53-7-148 but sought a restraining order to prevent the defendant from making contracts on behalf of the estate, and paying out funds belonging to the estate, without the concurrence of the complainants, which could not be granted by the ordinary (now probate judge) and which was contrary to the provisions of § 53-7-5, the allegations of the complaint show the necessity of the intervention of a court of equitable jurisdiction in order to prevent irreparable injury to the estate. Saffold v. Cheatham, 221 Ga. 155, 143 S.E.2d 629 (1965).

"Interest in the estate." — Under O.C.G.A. § 23-2-91(2), heirs at law, although not beneficiaries under a purported will, have a statutory "interest in the estate" to allow them standing to petition the superior court for equitable relief; "interest in the estate" in O.C.G.A. § 23-2-91(2), includes equitable redress in the superior court when adequate relief is otherwise unavailable. Johns v. Morgan, 281 Ga. 51, 635 S.E.2d 753 (2006).

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C.J.S. — 30 C.J.S., Equity, § 61.

ALR. — Power of court to authorize compromise of infants' rights in controversies over estates or property, 33 A.L.R. 105.

Applicability of nonclaim statutes to claims arising under contract executory at the time of death, 41 A.L.R. 144; 47 A.L.R. 896.

Rule as to marshaling assets as affected by homestead law, 44 A.L.R. 758; 77 A.L.R. 371.

Power of court to authorize pledge or other disposal of property in manner not authorized by trust deed or trust agreement securing bonds or participation certificates, 105 A.L.R. 195.

Doctrine of marshaling assets where the two funds covered by the paramount lien are subject respectively to subordinate liens in favor of different persons, 106 A.L.R. 1102.

Jurisdiction of equity to sequester, seize, enjoin transfer of, or otherwise provisionally secure assets for application upon money demand which has not been reduced to judgment, 116 A.L.R. 270.

Equity jurisdiction to determine valuation, where arbitration or appraisal has failed, under long-term lease providing for appraisal of premises and fixing rental value at stated intervals, 26 A.L.R.2d 744.

Applications of rule permitting courts to exercise jurisdiction over equity actions against foreign personal representatives where there are assets within forum, 53 A.L.R.2d 323.

Construction and operation of will or trust provision appointing advisors to trustee or executor, 56 A.L.R.3d 1249.

23-2-92. Application for direction or construction of will.

In cases of difficulty in construing wills, in distributing estates, in ascertaining the persons entitled, or in determining under what law property should be divided, the representative may ask the direction of the court, but not on imaginary difficulties or from excessive caution.

History. — Orig. Code 1863, § 3076; Code 1868, § 3088; Code 1873, § 3145; Code 1882, § 3145; Civil Code 1895, § 4000; Civil Code 1910, § 4597; Code 1933, § 37-404.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

For note, "Determining Principal and Income Allocation in Georgia Trusts," see 8 Ga. St. B.J. 564 (1972).

JUDICIAL DECISIONS

This section enables an administrator to bring a bill for instructions. Newsome v. Cagburn, 30 Ga. 291 (1860).

The superior courts have jurisdiction over construction of wills. National Audubon Soc'y, Inc. v. Marshall, 424 F.2d 717 (5th Cir. 1970).

Asking the court for direction (see O.C.G.A. § 23-2-92) is within one of the exceptions concerning when equity will interfere in the administration of estates (see O.C.G.A. § 23-2-91). But if the duty of the executor is clear, equity will not interfere. Adams v. Dixon, 19 Ga. 513, 65 Am. Dec. 608 (1856); Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934).

Devises which are contrary to law will be declared void by equity. Moore v. Cook, 151 Ga. 523, 107 S.E. 518 (1921).

Neither former Code 1933, § 37-404 (see O.C.G.A. § 23-2-92) nor former Code 1933, § 37-405 (see O.C.G.A. § 23-2-93) declared that an injunction must be granted; the propriety of this relief will depend upon the facts of each particular case, and the general principles of equity as related to injunction. Hudson v. Tate, 188 Ga. 707, 4 S.E.2d 577 (1939).

In action filed by executors in equity to marshal assets, and for direction, and to enjoin creditors, heirs, and legatees, named as defendants, from instituting any independent action with reference to the matters referred to in the petition, under the pleadings and the evidence the court did not err in refusing to grant an injunction. Hudson v. Tate, 188 Ga. 707, 4 S.E.2d 577 (1939).

Heirs at law may not maintain a complaint for the construction of a will. Wright v. Heffernan, 205 Ga. 75, 52 S.E.2d 289 (1949).

Devisee under the will cannot maintain a complaint for construction of the will. Rainey v. Woodcock, 211 Ga. 101, 84 S.E.2d 41 (1954).

Only the representative of an estate may ask direction of the court in cases of difficulty in construing wills, or in distributing estates, in ascertaining the persons entitled, or in determining under what law property should be divided, and such direction may not be invoked by a legatee. Jackson v. Callahan, 152 Ga. 236, 109 S.E. 499 (1921); Palmer v. Neely, 162 Ga. 767, 135 S.E. 90 (1926); McLarty v. Abercrombie, 168 Ga. 742, 149 S.E. 30 (1929); Campbell v. Trust Co., 197 Ga. 37, 28 S.E.2d 471 (1943); Wright v. Heffernan, 205 Ga. 75, 52 S.E.2d 289 (1949); Barfield v. Aiken, 209 Ga. 483, 74 S.E.2d 100 (1953).

Executor may bring a complaint for construction of a will although the executor may be a legatee thereunder. Watts v. Finley, 187 Ga. 629, 1 S.E.2d 723 (1939); Barker v. Wilkinson, 222 Ga. 329, 149 S.E.2d 698 (1966).

Court might entertain an action by executors for direction, and still appoint receivers to execute directions given therein; the two powers of the court are given equal recognition in the Code, and are not antagonistic, but are coordinate and consistent. Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939).

Widow can maintain action against her coexecutors in her representative capacity as executrix, but not in her individual capacity as legatee, widow and sole heir at law of testator; she can maintain action as executrix even though, since she has a manifest interest in the subject matter of the action, a decree will also adjudicate her claim as legatee, widow and heir at law. Armstrong v. Merts, 202 Ga. 483, 43 S.E.2d 512 (1947).

Legatee authorized to bring action upon showing of sufficient interest in estate and necessity for court's direction. — When legatee sought by her com-

plaint and was entitled to injunctive relief against the executor to prevent a premature distribution of the assets of the estate contrary to the directions of the will, and alleged that the executor had misconstrued the will, legatee's complaint showed such interest by the legatee in the estate and such necessity for construction of the will and direction by the court to protect her distributive share and legacy as would authorize her to bring the action. Barfield v. Aiken, 209 Ga. 483, 74 S.E.2d 100 (1953).

Creditor of a beneficiary of a will cannot bring a complaint for construction. Jackson v. Callahan, 152 Ga. 236, 109 S.E. 499 (1921). Nor can a legatee. Maneely v. Steele, 147 Ga. 399, 94 S.E. 227 (1917); Morrison v. McFarland, 147 Ga. 465, 94 S.E. 569 (1917).

Equitable interference not available to remainderman when life tenant still in life. — When the only title which, under the petition, could inure to claimants by virtue of the wills of third persons consisted of an alleged remainder interest after the death of a person still in life, and they would have no cause of action to recover the property before the death of such life tenant, former Code 1933, § 37-403 (see O.C.G.A. § 23-2-91) governing equitable interference with the administration of estates did not authorize such an action. Smith v. Pitchford, 189 Ga. 307, 5 S.E.2d 766 (1939).

Executor's uncertainty justified judgment action. — Executor of the estate and partnership head faced uncertainty with respect to conflicting duties to the partnership and to the estate and beneficiaries; thus, a declaratory judgment was an appropriate vehicle to clarify the executor's obligations, and the Georgia superior court had concurrent jurisdiction with the probate court to address those issues as well as was authorized to exercise the court's concurrent and equitable jurisdiction to decide the requests for the temporary restraining orders. Rentz v. Rentz, 339 Ga. App. 66, 793 S.E.2d 112 (2016).

In a complaint by an executor for construction of a will, all persons named as legatees are proper parties. Watts v. Finley, 187 Ga. 629, 1 S.E.2d 723 (1939).

Person who claims an interest in the estate, not arising under the will, is not a party to a complaint for direction. Bond v. Connelly, 8 Ga. 302 (1850).

When interveners are not claiming under the will but, their claim is antagonistic to the will, and they are claiming under the will of another, then the issue presents none of the questions included within the provisions of this section. Phillips v. Kelly, 176 Ga. 111, 167 S.E. 281 (1932).

Superior court will not construe a will when requested by the executor "on imaginary difficulties or from excessive caution." Venable v. Dallas, 212 Ga. 595, 94 S.E.2d 416 (1956).

Therefore, complaint seeking a declaratory judgment, which shows that the complainant was not uncertain or insecure as to his asserted rights as executor as against the claim of a legatee, was properly dismissed on demurrer (now motion to dismiss). Venable v. Dallas, 212 Ga. 595, 94 S.E.2d 416 (1956).

Where one item of a will contained a bequest of "twenty thousand ($20,000.00) dollars," and another item a bequest to the "University Hospital of Augusta, Georgia," there being no such legal entity in the said city, the executors of such will were authorized to bring in a superior court a complaint seeking construction and direction. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938).

Superior court will not assume jurisdiction of an estate and obstruct the procedure for the administration of an estate under the guise of construing the will. Bandy v. Smith, 211 Ga. 192, 84 S.E.2d 449 (1954).

Actions not countenanced from executor. — An executor who seeks the aid of a superior court and invokes a construction of the will with whose execution he has been charged by a testator will not be heard to retract his statement that the will requires construction, and mend his hold by contending, in substance, that the contents of the will are so plain as to require no construction, nor can an executor in such circumstances advocate or promote the interest of any party other than himself, in any litigation involving

the construction of the will. McAfee v. Board of Firemasters, 186 Ga. 262, 197 S.E. 802 (1938).

Complexity arising from agreement growing out of widow's application for dower was sufficient to sustain a complaint. Hill v. Clark, 48 Ga. 526 (1873).

If a widow is entitled to a year's support, there is no cause, legal or equitable, for delaying enjoyment of this right; and if it cannot be asserted against the executor, he can defend himself at law upon his title as executor, and has no need for an injunction. Smith v. Pitchford, 189 Ga. 307, 5 S.E.2d 766 (1939).

Probate court retains jurisdiction of estate when construction of a will becomes incidental to probate proceedings. — Though it is the rule that a direct proceeding to construe a will must be brought in a superior court, where the construction of a will is incidentally involved in a proceeding over which the probate court has jurisdiction, the probate court has jurisdiction under such conditions to interpret the will so far as may be necessary in the proceedings before it. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934).

Removal to a federal court of an action for directions in the distribution of estates is not permitted. Shehane v. Smith, 257 F. 823 (N.D. Ga. 1919).

Cash surrender value of policy not subject to garnishment. — The cash surrender and cash loan value of a policy of life insurance accruing at the end of a specified tontine period is not subject to garnishment by creditors of the insured; nor will such value be made available to the judgment creditor of the insured by a superior court in proceedings instituted for the purpose of obtaining equitable relief analogous to a process of garnishment at law. F & M Bank v. National Life Ins. Co., 161 Ga. 793, 131 S.E. 902, 44 L.R.A. 1184 (1926).

Determining ownership of bank deposit not same as construction of a will. — When a suit was brought by an executor against the wife of the deceased, for the purpose of determining the ownership of money on deposit in a bank, the construction of the will was not involved, and the allegations and prayers of the petition would not meet the provisions of former Code 1933, § 37-405 (see O.C.G.A. § 23-2-93), for marshaling assets or for any other equitable relief. Trust Co. v. Fauss, 195 Ga. 611, 24 S.E.2d 799 (1943).

Cited in Clark v. Clark, 17 Ga. 485 (1855); Sanford v. Thompson, 18 Ga. 554 (1855); Miles & Co. v. Peabody, 64 Ga. 729 (1880); Mechanics' & Traders' Bank v. Harrison, 68 Ga. 463 (1882); Echols v. Almon, 77 Ga. 330, 1 S.E. 269 (1886); Gaines v. Gaines, 116 Ga. 476, 42 S.E. 763 (1902); Durham v. Harris, 134 Ga. 134, 67 S.E. 668 (1910); Moore v. Cook, 151 Ga. 523, 107 S.E. 518 (1921); Cooper v. Reeves, 161 Ga. 232, 131 S.E. 63 (1925); Hamrick v. Prewett, 174 Ga. 895, 164 S.E. 678 (1932); Reynolds v. Ingraham, 179 Ga. 398, 175 S.E. 918 (1934); Reece v. McCrary, 179 Ga. 812, 177 S.E. 741 (1934); Pattison v. Farkas, 180 Ga. 798, 180 S.E. 831 (1935); Kemp v. Trust Co., 182 Ga. 884, 187 S.E. 75 (1936); Bearden v. Longino, 183 Ga. 819, 190 S.E. 12 (1937); Morris v. Morris, 185 Ga. 533, 195 S.E. 734 (1937); Brown v. Anderson, 186 Ga. 220, 197 S.E. 761 (1938); Lassiter v. Bank of Dawson, 191 Ga. 208, 11 S.E.2d 910 (1940); Pharis v. Perry, 193 Ga. 125, 17 S.E.2d 545 (1941); Maxwell v. Hollis, 216 Ga. 224, 115 S.E.2d 360 (1960); Georgia Money Corp. v. Rissman, 220 Ga. 476, 139 S.E.2d 486 (1964); Williams v. Cowan, 226 Ga. 319, 174 S.E.2d 789 (1970); McNeely v. McNeely, 228 Ga. 418, 186 S.E.2d 105 (1971); Charles v. Citizens & S. Nat'l Bank, 232 Ga. 208, 206 S.E.2d 8 (1974); Trust Co. v. Woodruff, 236 Ga. 220, 223 S.E.2d 91 (1976); Underwood v. MacKendree, 242 Ga. 666, 251 S.E.2d 264 (1978); DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 55.

C.J.S. — 30 C.J.S., Equity, § 61.

ALR. — Right of trustee, executor, or

administrator to maintain interpleader, 152 A.L.R. 1122.

Applications of rule permitting courts to exercise jurisdiction over equity actions against foreign personal representatives where there are assets within forum, 53 A.L.R.2d 323.

Construction and operation of will or trust provision appointing advisors to trustee or executor, 56 A.L.R.2d 1249.

23-2-93. Marshaling assets of decedent's estate.

In all cases where legal difficulties arise as to the distribution of assets in payment of debts or where from any circumstances the ordinary process of law would interfere with the due administration of an estate, without fault on the part of the representative of the estate, a petition to marshal the assets shall be maintained at the instance of the representative.

History. — Orig. Code 1863, § 3077; Code 1868, § 3089; Code 1873, § 3146; Code 1882, § 3146; Civil Code 1895, § 4001; Civil Code 1910, § 4598; Code 1933, § 37-405.

JUDICIAL DECISIONS

This section grants the right to an administrator to marshal the assets in equity where an estate is insolvent, and he is harassed by actions at law by creditors. Johnson v. Flanders, 65 Ga. 691 (1880).

Existence of a constructive trust is not always necessary to confer jurisdiction. Walker v. Morris, 14 Ga. 323 (1853).

Under former Civil Code 1910, § 5479 (see O.C.G.A. § 9-8-3), equity may appoint a receiver to marshal assets, where a creditors' petition is filed. Harrell v. Bank of Leesburg, 159 Ga. 854, 127 S.E. 228 (1925).

Creditors with superior claims, which are not disputed cannot be joined in the petition. Green v. Allen, 45 Ga. 205 (1872); Turk v. Ross, 59 Ga. 378 (1877); Herrington v. Tolbert, 110 Ga. 528, 35 S.E. 687 (1900).

Petition may be filed when the estate is solvent. Daniel v. Columbus Fertilizer Co., 96 Ga. 775, 22 S.E. 904 (1895).

Actions at law are enjoined when a creditors' petition is filed by a temporary administrator. Beers & Bogart v. Strohecker, 21 Ga. 442 (1857); Johnson v. Brady, 24 Ga. 131 (1858).

Corporation cannot maintain creditor's petition to marshal its assets. Bank of Soperton v. Empire Realty Trust Co., 142 Ga. 34, 82 S.E. 464 (1914).

Jurisdiction of the court cannot be attacked collaterally. Bartlett v. Taylor, 148 Ga. 854, 98 S.E. 491 (1919).

Ascertainment of the fund which can be distributed is the primary step, after a petition is filed. Jordan v. Brown, 72 Ga. 495 (1884).

Willful disobedience of the provisions of a will, will bar a petition. Campbell v. Campbell, 37 Ga. 465 (1867). See Beers & Bogart v. Strohecker, 21 Ga. 442 (1857).

A plea of the statute of limitation against some debts, and not others, is improper. Jordan v. Brown, 72 Ga. 495 (1884).

When executor carried on the business of the decedent for a year, a petition may be maintained to determine order of payment of debts. Stephens v. James, 77 Ga. 139, 3 S.E. 160 (1886).

Neither former Code 1933, § 37-404 (see O.C.G.A. § 23-2-92) nor former Code 1933, § 37-405 (see O.C.G.A. § 23-2-93) declared that an injunction must be granted; the propriety of this relief will depend upon the facts of each particular case, and the general principles of equity as related to injunction. Hudson v. Tate, 188 Ga. 707, 4 S.E.2d 577 (1939).

In action filed by executors in equity to marshal assets, and for direction, and to enjoin creditors, heirs, and legatees, named as defendants, from instituting any independent action with reference to the matters referred to in the petition, under the pleadings and the evidence the court did not err in refusing to grant an injunction. Hudson v. Tate, 188 Ga. 707, 4 S.E.2d 577 (1939).

Determining ownership of bank deposit not same as construction of a will. — When an action was brought by an executor against the wife of the deceased, for the purpose of determining the ownership of money on deposit in a bank, the construction of the will was not involved, and the allegations and prayers of the petition would not meet the requirements for marshaling assets or for any other equitable relief. Trust Co. v. Fauss, 195 Ga. 611, 24 S.E.2d 799 (1943).

Junior creditor is not entitled to marshaling assets against a senior creditor, unless it is shown that its application will actually benefit the junior creditor, and also will not impair or hazard the securities of the senior creditor, or unreasonably delay their enforcement. Moncrief Furnace Co. v. Northwest Atlanta Bank, 193 Ga. 440, 19 S.E.2d 155 (1942).

Cited in George P. Thomas & Co. v. Stokes, 44 Ga. 631 (1872); Hamrick v. Prewett, 174 Ga. 895, 164 S.E. 678 (1932); Federal Land Bank v. Farmers' & Merchants' Bank, 177 Ga. 505, 170 S.E. 504 (1933); Kemp v. Trust Co., 182 Ga. 884, 187 S.E. 75 (1936); Maxwell v. Hollis, 216 Ga. 224, 115 S.E.2d 360 (1960); Estes v. First Nat'l Bank, 223 Ga. 653, 157 S.E.2d 449 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 55.

ALR. — Rule as to marshaling assets where liens are concurrent as to one fund, 36 A.L.R. 663.

Rule as to marshaling assets as affected by homestead law, 44 A.L.R. 758; 77 A.L.R. 371.

Doctrine of marshaling assets or sale in inverse order of alienation as applicable to tax sale, 88 A.L.R. 1216; 131 A.L.R.4th 79.

Right of maker of negotiable paper which is subject to defenses as against payee-pledgor, but not as against pledgee (by invoking doctrine of marshaling assets or otherwise) to require the latter to resort first to other collateral, 92 A.L.R. 1085.

Doctrine of marshaling assets where the two funds covered by the paramount lien are subject respectively to subordinate liens in favor of different persons, 106 A.L.R. 1102.

Doctrine of inverse order of alienation as affected by release of part of property covered by mortgage or other lien, 110 A.L.R. 65; 131 A.L.R.4th 108.

Jurisdiction of equity to sequester, seize, enjoin transfer of, or otherwise provisionally secure assets for application upon money demand which has not been reduced to judgment, 116 A.L.R. 270.

Sale in inverse order of alienation, 131 A.L.R. 4.

Applications of rule permitting courts to exercise jurisdiction over equity actions against foreign personal representatives where there are assets within forum, 53 A.L.R.2d 323.

May doctrine of marshaling assets be invoked to require senior lienor to resort first to the surety, or property of the surety, of common debtor, 135 A.L.R. 738.

Doctrine of marshaling assets or sale in inverse order of alienation as applicable to tax sale, 131 A.L.R.4th 79.

Doctrine of inverse order of alienation as affected by release of part of property covered by mortgage or other lien, 131 A.L.R.4th 108.

23-2-94. Compelled election in marshaling assets.

In marshaling assets, the court shall look to the equities of the creditors and, where cases arise for election, shall compel the parties to elect.

History. — Orig. Code 1863, § 3078; Code 1868, § 3090; Code 1873, § 3147; Code 1882, § 3147; Civil Code 1895, § 4002; Civil Code 1910, § 4599; Code 1933, § 37-406.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 55.

ALR. — Rule as to marshaling assets as affected by homestead law, 44 A.L.R. 758; 77 A.L.R. 371.

Doctrine of marshaling assets where the two funds covered by the paramount lien are subject respectively to subordinate liens in favor of different persons, 106 A.L.R. 1102.

Doctrine of marshaling assets where the two funds covered by the paramount lien are subject respectively to subordinate liens in favor of different creditors, 76 A.L.R.3d 326.

23-2-95. Creditors' petitions.

Creditors' petitions may be filed at the instance of any creditor, the privilege being extended to all to appear and become parties within a reasonable time.

History. — Orig. Code 1863, § 3079; Code 1868, § 3091; Code 1873, § 3148; Code 1882, § 3148; Civil Code 1895, § 4003; Civil Code 1910, § 4600; Code 1933, § 37-407.

JUDICIAL DECISIONS

This section does not confine the right to bring a creditor's petition to instances where one has a lien, or has reduced the claim to judgment. Stephens v. Whitehead, 75 Ga. 294 (1885); Steele Lumber Co. v. Laurens Lumber Co., 98 Ga. 329, 24 S.E. 755 (1896).

The nature of a creditors' petition is a proceeding in rem, and any person in interest may come in before disposition of the fund. Minnehan & Hazlehurst v. Brunswick & A.R.R., 52 Ga. 248 (1874).

Burden is upon the creditor to contradict the priorities as arranged in the decree. Gray v. Perry, 51 Ga. 180 (1874).

Exemption set apart to a bankrupt may be reached by creditors holding notes containing waivers of exemption. Peppers v. Cauthen, 143 Ga. 229, 84 S.E. 477 (1915).

Creditors not deprived of right to petition by bank's assignment. — An assignment by a bank of its effects to which the creditors are not parties or consenting, cannot deprive them of the right to maintain a petition. Schley v. Dixon, 24 Ga. 273, 71 Am. Dec. 121 (1858).

Creditors of an insolvent corporation may unite in the same petition to charge the stockholders, who were also directors, for fraudulently abstracting the capital stock of the bank. Semmes v. Mott, 27 Ga. 92 (1859).

A decree that the debtor's money be paid into court will follow where a

defendant in a creditors' petition admits that he has such funds. Rutherford v. Jones, 26 Ga. 150 (1858).

Prior to the decree, the defendant may tender satisfaction and compel the creditor to accept it. McDougald v. Dougherty, 11 Ga. 570 (1852).

Cited in Martin v. Tidwell, 36 Ga. 332 (1867); Albany & Renssellaer Iron & Steel Co. v. Southern Agric. Works, 76 Ga. 135, 2 Am. St. R. 26 (1886); Hardy v. Hardy, 143 Ga. 703, 86 S.E. 780 (1915); Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937); J.B. Withers Cigar Co. v. Kirkpatrick, 196 Ga. 41, 26 S.E.2d 255 (1943); Turner v. Tyson, 211 Ga. 53, 84 S.E.2d 86 (1954).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Creditors' Bills, § 1 et seq.

C.J.S. — 21 C.J.S., Creditor and Debtor, § 114 et seq.

23-2-96. When equitable assets may be reached by creditor.

Equitable assets may be reached by a creditor in every case where he shows that there is danger of not being satisfied out of legal assets.

History. — Orig. Code 1863, § 3084; Code 1868, § 3096; Code 1873, § 3153; Code 1882, § 3153; Civil Code 1895, § 4004; Civil Code 1910, § 4601; Code 1933, § 37-408.

Law reviews. — For article, "Retirement Benefits: Protection from Creditors' Claims," see 24 Ga. St. B.J. 118 (1988).

For note, "Georgia Becomes A Quasi Community Property State,"see 17 Ga. St. B.J. 134 (1981).

For comment, "The Georgia Supreme Court's Creation of an Equitable Interest in Marital Property — Yours? Mine? Ours!," see 34 Mercer L. Rev. 449 (1982).

JUDICIAL DECISIONS

Appointment of receiver to sell debtor's property to prevent financial loss by judgment creditor. — When a debt secured by a deed is interest bearing and not due, and a redemption under former Code 1933, §§ 39-201, 39-202 (see O.C.G.A. § 9-13-60) would cause the judgment creditor to lose a substantial sum approximating the amount of the unearned interest, the debtor having no other property from which to satisfy the judgment, a subsequent judgment creditor may proceed in equity for the appointment of a receiver for the purpose of selling the property subject to the principal of the debt and accrued interest. Cook v. Securities Inv. Co., 184 Ga. 544, 192 S.E. 179 (1937).

Creditors can bring a petition in equity to reach the interest of a beneficiary under a trust unless the beneficiary's interest is exempt by the terms of the trust or by statute. The creditor must exhaust legal remedies before proceeding in equity, but this requirement does not apply if it appears that the attempt to exhaust legal remedies would be futile. Henderson v. Collins, 245 Ga. 776, 267 S.E.2d 202 (1980).

Cited in Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937); Yancey v. Grafton, 197 Ga. 117, 27 S.E.2d 857 (1943).

RESEARCH REFERENCES

ALR. — Jurisdiction of equity to sequester, seize, enjoin transfer of, or otherwise provisionally secure assets for application upon money demand which has not been reduced to judgment, 116 A.L.R. 270.

23-2-97. Time limit for intervention in case disposing of assets; publication of order.

(a) In all equity cases in which assets of either or both parties are being administered, marshaled, or otherwise disposed of by the court, upon motion of either party or of the court at least 60 days before the term for trial, an order shall be passed bearing the title of the case and addressed to all persons concerned, requiring all persons claiming an interest in the assets to intervene in the case by not later than a certain date to be fixed by the court. The date shall be not less than 60 days nor more than 90 days from the date on which the order is filed. After filing, the order shall be published twice each month for two consecutive months in the official organ for legal advertisements in the county in which the case is pending.

(b) After the passage of the last date for intervention fixed in the published order, no person interested in the assets of the case shall be allowed to intervene.

History. — Ga. L. 1939, p. 344, §§ 1, 2.
Law reviews. — For article discussing the problems with acquiring good title, see 15 Ga. B.J. 281 (1953).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 23-2-97, insofar as it purports to allow termination of claims after service by publication on known claimants whose whereabouts are known and who are present within the state, violates due process. Suttles v. J.B. Withers Cigar Co., 194 Ga. 617, 22 S.E.2d 129 (1942); to the extent that it holds to the contrary, is hereby overruled. Johnson v. Mayor of Carrollton, 249 Ga. 173, 288 S.E.2d 565 (1982).

Purpose of this section is to fix a certain date when an estate being administered by an officer of the court, can be closed, rights fixed, and distribution of the assets made. If claims are to be recognized, either by way of amended claims or as new claims, after the date fixed in accordance with the provisions of this section, the very purpose of the law would be defeated. Cohen v. McCandless, 202 Ga. 231, 42 S.E.2d 739 (1947).

It was the intention of the legislature to correct the fact that no purchaser knew whether he would purchase property free of liens, and that no receiver could be sure of selling property free of liens. Jones v. Staton, 78 Ga. App. 890, 52 S.E.2d 481 (1949).

All cases, including equity cases, are excluded from this section when there are no assets to administer, marshal, or otherwise dispose of by the court. Pope v. Pope, 211 Ga. 74, 84 S.E.2d 43 (1954).

In order for the court to issue an order to bar the filing of interventions in equity cases after the date fixed in such order, it is essential that the court have in its control assets to administer, marshal, or otherwise dispose of. Maxwell v. Hollis, 216 Ga. 224, 115 S.E.2d 360 (1960).

Superior courts can issue bar orders only in cases where the courts have in hand assets that are being administered, marshaled, or otherwise disposed of by the court. Pope v. Pope, 211 Ga. 74, 84 S.E.2d 43 (1954).

Generally failure to comply with a "bar order" in receivership proceedings after notice precludes sharing in assets, similarly, failure to comply with a "bar order" directing claimants to appear and make known their objections to the receiver's final report and recommendations generally precludes later objections. Fibertex, Inc. v. Caldwell, 236 Ga. 136, 223 S.E.2d 111 (1976).

Case must be pending before superior court. — While this section refers to "all equity cases" now or hereafter pending, it joins thereto the qualifying provision, "wherein assets of either or both parties to the cause are being administered, marshaled, or otherwise disposed of by the court," thus plainly and conclusively showing that, before this section can be resorted to, the case must be pending in a superior court, and assets must then be in the custody of the court for the purpose of being administered, marshaled, or otherwise disposed of. Pope v. Pope, 211 Ga. 74, 84 S.E.2d 43 (1954); Maxwell v. Hollis, 216 Ga. 224, 115 S.E.2d 360 (1960).

Section applicable to tax execution. — This section provides for circumstances under which all creditors may by inaction lose their rights, including creditors holding executions. It is therefore applicable to tax executions. Suttles v. J.B. Withers Cigar Co., 194 Ga. 617, 22 S.E.2d 129 (1942).

Effect of bar order on tax collector and taxes. — A bar order passed by the court, and the advertisement pursuant thereto in reference to intervention in an execution sales places the tax collector, so far as taxes are concerned, as any other lienholder. Jones v. Staton, 78 Ga. App. 890, 52 S.E.2d 481 (1949).

Filing of required intervention not obviated by necessity and dignity of taxes. — Neither the fact that all parties and intervenors might be chargeable, as a matter of law with notice that taxes have not been paid, nor that taxes are, under the law, of the highest dignity, obviates the necessity of the filing of an intervention as required by the statute. Suttles v. J.B. Withers Cigar Co., 194 Ga. 617, 22 S.E.2d 129 (1942).

Fact that a tax collector was not an actual party to the record does not take him out of the class of "parties interested" in the assets, so as to make the provision inapplicable to him. Suttles v. J.B. Withers Cigar Co., 194 Ga. 617, 22 S.E.2d 129 (1942).

When United States government can be joined as a party in state court without consent. — While it is universally recognized that the United States, as sovereign, is immune from action except as it consents to be sued and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the action, yet where civil litigation involving conflicting claims of ownership of real and personal property and a receivership is pending in a state court having jurisdiction of the subject matter, wherein certain parties by interventions duly allowed seek the foreclosure of mortgages and loan deeds upon real and personal property on which the United States claims a lien under jeopardy assessments issued by the Collector of Internal Revenue for unpaid income taxes, the United States may be made a party to such proceeding under the provisions of 28 U.S.C. § 2410(a), by the issuance and proper service of a bar order such as is authorized under this section. United States v. Bullard, 209 Ga. 426, 73 S.E.2d 179 (1952).

Cited in Chas. S. Martin Distrib. Co. v. Cooper, 211 Ga. 64, 84 S.E.2d 1 (1954); Buford Com. Bank v. Luker, 126 Ga. App. 586, 191 S.E.2d 489 (1972).

OPINIONS OF THE ATTORNEY GENERAL

A tax collector cannot legally levy a tax execution against property sold at a receivership sale pursuant to court order but he is relegated to enforcing his claim against the proceeds of the sale. 1952-53 Op. Att'y Gen. p. 205.

RESEARCH REFERENCES

ALR. — Rule as to marshaling assets as affected by homestead law, 44 A.L.R. 758; 77 A.L.R. 371.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint depositors, 11 A.L.R.2d 1465.

23-2-98. Application of joint and individual assets to debts.

Joint assets shall be applied to joint debts, and individual assets to individual debts; but, when the joint assets are exhausted, the joint debts may come upon individual assets, the individual debts, without regard to relative dignity as compared with the joint debts, being first advanced the pro rata amount received on the joint debts from joint assets.

History. — Orig. Code 1863, § 3085; Code 1868, § 3097; Code 1873, § 3154; Code 1882, § 3154; Civil Code 1895, § 4005; Civil Code 1910, § 4602; Code 1933, § 37-409.

ARTICLE 6

EXERCISE OF POWERS OF APPOINTMENT AND SALE

23-2-110. Equitable jurisdiction over powers.

Powers, especially of appointment, being always founded on trust or confidence, are peculiarly subjects of equitable supervision.

History. — Orig. Code 1863, § 3097; Code 1868, § 3109; Code 1873, § 3166; Code 1882, § 3166; Civil Code 1895, § 4017; Civil Code 1910, § 4614; Code 1933, § 37-601.

23-2-111. Exercise of discretionary powers not compellable generally.

Equity may not compel a party, having a discretion, to exercise a power of appointment.

History. — Orig. Code 1863, § 3098; Code 1868, § 3110; Code 1873, § 3167; Code 1882, § 3167; Civil Code 1895, § 4018; Civil Code 1910, § 4615; Code 1933, § 37-602.

JUDICIAL DECISIONS

Bankruptcy court could not compel a trustee under a will to exercise power of appointment which gave her total discretion as to the payment of trust corpus or income to the testator's descendants, one of whom was the debtor. Arney v. Hicks, 22 Bankr. 243 (Bankr. N.D. Ga. 1982).

23-2-112. When faithful execution of power compellable.

In all cases where no discretion is allowed or the discretion allowed is abused, equity may compel a faithful execution of the power.

History. — Orig. Code 1863, § 3102; Code 1868, § 3114; Code 1873, § 3171; Code 1882, § 3171; Civil Code 1895, § 4022; Civil Code 1910, § 4619; Code 1933, § 37-606.

JUDICIAL DECISIONS

Cited in Cowart v. Budreau, 90 Ga. App. 316, 82 S.E.2d 877 (1954); Dockery v. Parks, 117 Ga. App. 589, 161 S.E.2d 406 (1968).

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Powers, §§ 33 et seq., 48.

ALR. — When power to appoint property regarded as a power in trust which equity will exercise in the event of donee's failure, 80 A.L.R. 503.

Will executed before creation of power to appoint property as an exercise of the power, 91 A.L.R. 621.

Property covered by power of appointment as subject to claims of donee's creditors, 97 A.L.R. 1071; 121 A.L.R. 803.

Parties defendant to stockholder's suit to compel declaration of dividend, 15 A.L.R.2d 1124.

23-2-113. When equity may relieve against collusive, illusory, mistaken, etc., executions.

(a) As used in this Code section, the term:

(1) "Collusive execution" means every execution whereby the person exercising a power uses it by contrivance for his own benefit, he not being legitimately an intended beneficiary.

(2) "Illusory appointment" means an appointment whereby a nominal benefit only is given to one of a class, to all of whom a substantial benefit was intended.

(b) Equity may relieve against mistaken or defective executions, collusive executions, and illusory appointments.

History. — Orig. Code 1863, §§ 3098, 3099, 3100; Code 1868, §§ 3110, 3111, 3112; Code 1873, §§ 3167, 3168, 3169; Code 1882, §§ 3167, 3168, 3169; Civil Code 1895, §§ 4018, 4019, 4020; Civil Code 1910, §§ 4615, 4616, 4617; Code 1933, §§ 37-602, 37-603, 37-604.

RESEARCH REFERENCES

Am. Jur. 2d. — 62 Am. Jur. 2d, Powers, § 73.

C.J.S. — 72 C.J.S., Powers, § 45.

ALR. — Property covered by power of

appointment as subject to claims of donee's creditors, 59 A.L.R. 1510; 97 A.L.R. 1071; 121 A.L.R. 803.

23-2-114. Powers of sale to be construed strictly; manner of sale; who may exercise.

Powers of sale in deeds of trust, mortgages, and other instruments shall be strictly construed and shall be fairly exercised. In the absence of stipulations to the contrary in the instrument, the time, place, and manner of sale shall be that pointed out for public sales. Unless the instrument creating the power specifically provides to the contrary, a personal representative, heir, heirs, legatee, devisee, or successor of the grantee in a mortgage, deed of trust, deed to secure debt, bill of sale to secure debt, or other like instrument, or an assignee thereof, or his personal representative, heir, heirs, legatee, devisee, or successor may exercise any power therein contained; and such powers may so be exercised regardless of whether or not the transfer specifically includes the powers or conveys title to the property described. A power of sale not revocable by death of the grantor or donor may be exercised after his death in the same manner and to the same extent as though the grantor or donor were in life; and it shall not be necessary in the exercise of the power to advertise or sell as the property of the estate of the deceased nor to make any mention of or reference to the death.

History. — Civil Code 1895, § 4023; Civil Code 1910, § 4620; Code 1933, § 37-607; Ga. L. 1937, p. 481, § 1; Ga. L. 1967, p. 735, § 1.

History of Code section. — The first two sentences of this Code section are derived from the decision in Calloway v. People's Bank, 54 Ga. 441 (1875).

Cross references. — Ambiguous terms and rules of construction of instruments, § 11-3-118. Operation of "open-end" clauses in real estate mortgages and deeds to secure debt, § 44-14-1. Barring of power of sale in conveyance of real property to secure debt, see § 44-14-81.

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration
Strict Construction
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1. In General
2. Mortgage
3. Adequate Price Required

General Consideration

Provisions regarding exercise of powers of sale are applicable only to instances when a creditor is seeking to sell property to enforce the payment of a debt or demand secured by such an instrument and does not embrace a will forever disposing of the property of the testator after death, and providing, without more, for the appointment of a successor trustee. Gilmore v. Gilmore, 201 Ga. 770, 41 S.E.2d 229 (1947).

Duty of mortgagee to exercise fairly and in good faith power of sale. — There exists a statutory duty upon a mortgagee to exercise fairly and in good faith the power of sale in a deed to secure debt. Although arising from a contractual right, breach of this duty is a tort compensable at law. Clark v. West, 196 Ga. App. 456, 395 S.E.2d 884 (1990).

Words "sell" and "dispose" are synonymous when coupled together in designating a power in a will authorizing the sale and disposal of property, when accompanied by a further statement that the sale or disposition may be made at public or private sale, since such words limit the method of disposition of property to a conveyance, and they are equally synonymous when so used in a trust deed. Lindsey v. Robinson, 180 Ga. 648, 180 S.E. 106 (1935).

Power of sale does not authorize a trustee to transfer the title for some other purpose. Lindsey v. Robinson, 180 Ga. 648, 180 S.E. 106 (1935).

Payment in full of the debt renders the trust deed functus officio, and ipso facto extinguishes the power of sale. Thurman v. Lee, 181 Ga. 408, 182 S.E. 609 (1935).

An owner of land sold at public auction under a power of sale in a security deed has a right to come into equity whenever it appears that the purchaser or trustee made untrue representations, whereby other persons were prevented from bidding and by which the land was obtained at an undervalue. Holbrook v. Dickson, 195 Ga. 821, 25 S.E.2d 671 (1943).

Claimant lacked standing to challenge the validity of the assignment of the mortgage under Georgia law because the claimant was not a party to that assignment. Harvin v. Nationwide Title Clearing, 632 Fed. Appx. 599 (11th Cir. 2016) (Unpublished).

Wrongful foreclosure action recognized. — Trial court erred by directing verdict in favor of plaintiff on defendants' wrongful foreclosure claim, as Georgia recognized such a claim and even allowed for damages for mental anguish, despite no evidence indicating that wrongful foreclosure interfered with any attempted sale of the property. DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 662 S.E.2d 141 (2008).

Homeowner's allegation that the homeowner did not receive notice of default and an opportunity to cure before acceleration of the debt, as required by the security deed, appeared to allege properly a breach of the duty to exercise the power of sale fairly under the statute. Carter v. HSBC Mortg. Servs., 622 Fed. Appx. 783 (11th Cir. 2015) (Unpublished).

Wrongful foreclosure claim sufficiently pled. — Trial court erred by dismissing the mortgagors' complaint for wrongful foreclosure because, construed in the light most favorable to the mortgagors, the complaint sufficiently alleged that the bank owed obligations to the mortgagors under the security deed and that the bank breached those contractual obligations by going forward with the foreclosure sale despite the error in the published foreclosure advertisements. Racette v. Bank of Am., N.A., 318 Ga. App. 171, 733 S.E.2d 457 (2012).

Putative successor in interest was not entitled to summary judgment on the debtor's wrongful foreclosure claim because the debtor pointed to evidence from which a reasonable jury could have concluded that the successor's conduct at the foreclosure sale, which included abruptly deciding to sell the personal property separately and offering a bid of $25,000 for property the successor believed was worth substantially more, chilled the bidding. LSREF2 Baron, LLC v. Alexander SRP Apts., LLC, 17 F. Supp. 3d 1289 (N.D. Ga. 2014).

There was a genuine issue of material fact as to whether the defendant's wrongful exercise of the power of sale was a

General Consideration (Cont'd)

breach of the duty of good faith owed to the debtor and there was also a genuine issue as to whether the debtor had suffered damages as a result of the foreclosure sale. McDaniel v. SunTrust Bank (In re McDaniel), 523 B.R. 895 (Bankr. M.D. Ga. 2014).

Debtor's claims against creditor bank for wrongful foreclosure and equitable rescission sufficiently stated claims for relief because the allegation that a representative of the bank caused the debtor to believe that a foreclosure sale was cancelled such that the debtor was misled into deferring the exercise of the debtor's legal rights to prevent the foreclosure (by filing a Chapter 13 case) was sufficient to state claims for wrongful foreclosure and rescission of the foreclosure. Laforest v. Branch Banking & Trust Co. (In re Laforest), No. 19-4011-PWB, 2019 Bankr. LEXIS 1913 (Bankr. N.D. Ga. June 24, 2019).

Wrongful foreclosure claim defeated. — Plaintiff's claim for wrongful exercise of a power of sale under O.C.G.A. § 23-2-114 was defeated by the plaintiff's default on the plaintiff's loan obligations and failure to cure the default before foreclosure. Thus, the plaintiff could not show causation because any alleged injury was solely attributable to the plaintiff's own actions. Howard v. Mortg. Elec. Registration Sys., No. 1:10-cv-1630-WSD, 2012 U.S. Dist. LEXIS 116366 (N.D. Ga. Aug. 17, 2012).

Law firm was not a proper party to a claim for wrongful foreclosure when the plaintiff alleged only that the firm acted as counsel in the foreclosure. Thompson-El v. Bank of Am., N.A., 327 Ga. App. 309, 759 S.E.2d 49 (2014).

HUD regulations clearly referenced in a deed as conditions precedent to the power to accelerate and the power of sale could form the basis of a breach of contract action; the homeowner asserted a duty that the bank owed the homeowner, and the homeowner's claim was not barred by the preexisting duty rule. Bates v. JPMorgan Chase Bank, NA, 768 F.3d 1126 (11th Cir. 2014).

Allegation of failure to provide notice supports wrongful foreclosure claim. — Trial court erred in finding that a mortgagor's claim that the mortgagee breached the mortgagee's duty in failing to provide proper notice of the foreclosure sale showed no basis for a wrongful foreclosure claim because an allegation that the lender failed to provide notice of foreclosure as required by O.C.G.A. § 44-14-162.2 supported a wrongful foreclosure claim under Georgia law and the trial court erroneously considered the mortgagee's evidence outside of the pleadings. Mbigi v. Wells Fargo Home Mortg., 336 Ga. App. 316, 785 S.E.2d 8 (2016).

Cited in Sims v. Etheridge, 169 Ga. 400, 150 S.E. 647 (1929); Oliver v. Wayne, 183 Ga. 316, 188 S.E. 535 (1936); McMullen v. Carlton, 192 Ga. 282, 14 S.E.2d 719 (1941); Renfroe v. Butts, 192 Ga. 720, 16 S.E.2d 551 (1941); Delray, Inc. v. Reddick, 194 Ga. 676, 22 S.E.2d 599 (1942); Gurr v. Gurr, 198 Ga. 493, 32 S.E.2d 507 (1944); Cordell v. Cordell, 206 Ga. 214, 56 S.E.2d 251 (1949); Sale City Peanut & Milling Co. v. Planters & Citizens Bank, 107 Ga. App. 463, 130 S.E.2d 518 (1963); Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442, 139 S.E.2d 302 (1964); Smith v. Taylor, 120 Ga. App. 389, 170 S.E.2d 752 (1969); Holderness v. Lands W., Inc., 232 Ga. 452, 207 S.E.2d 464 (1974); Andrews v. Holloway, 140 Ga. App. 622, 231 S.E.2d 548 (1976); Moody v. Mendenhall, 238 Ga. 689, 234 S.E.2d 905 (1977); Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977); Oglethorpe Co. v. United States, 558 F.2d 590 (Ct. Cl. 1977); Curl v. Federal Sav. & Loan Ass'n, 241 Ga. 29, 244 S.E.2d 812 (1978); Hartrampf v. Citizens & S. Realty Investors, 146 Ga. App. 227, 246 S.E.2d 134 (1978); Heard v. Decatur Fed. Sav. & Loan Ass'n, 157 Ga. App. 130, 276 S.E.2d 253 (1980); Hilton v. Millhaven Co., 158 Ga. App. 862, 282 S.E.2d 415 (1981); Cummings v. Anderson, 173 Bankr. 959 (Bankr. N.D. Ga. 1994); Green Rivers Forest, Inc. v. Aetna Life Ins. Co., 200 Bankr. 956 (Bankr. M.D. Ga. 1996); Aikens v. Wagner, 231 Ga. App. 178, 498 S.E.2d 766 (1998); Atlanta Dwellings, Inc. v. Wright, 272 Ga. 231, 527 S.E.2d 854 (2000).

Strict Construction

Powers of sale in deeds to secure debt are matters of contract, and they

must be strictly construed and will be enforced as written. Verner v. McLarty, 213 Ga. 472, 99 S.E.2d 890 (1957); Holland v. Sterling, 214 Ga. 583, 105 S.E.2d 894 (1958).

Sale on date other than advertised date. — When by undisputed facts it appears that the sale took place on a date other than as advertised, the court did not err in granting the judgment declaring the order of confirmation null and void, and this is so whether his judgment is considered a judgment on the pleadings, summary judgment, or judgment vacating and setting aside for a nonamendable defect appearing on the face of the record. Hood Oil Co. v. Moss, 134 Ga. App. 477, 214 S.E.2d 726 (1975).

Strict construction means no extension by interpretation. — Powers of sale contained in deeds to secure a debt and instruments of similar nature are strictly construed and must be fairly exercised. In construing such instruments the words employed to express the intention of the parties will be given their ordinary signification, and where the language of the document is plain, its meaning will not be extended by interpretation. Cordele Banking Co. v. Powers, 217 Ga. 616, 124 S.E.2d 275 (1962).

Strict construction of power of sale. — A power in a security deed authorizing a sale of the property conveyed, by "party of the second part (the grantee), its agents, or legal representatives, or the sheriff of the county in which the land is situate," does not authorize a sale of the property under the power by a transferee of the grantee, under the rule of strict construction applicable to such powers. Stewart v. Metropolitan Life Ins. Co., 180 Ga. 848, 181 S.E. 181 (1935).

While powers of sale in deeds to secure debt shall be strictly construed and exercised, where the evidence is conflicting in a suit attacking the manner in which a power of sale was being exercised, it is insufficient to show an abuse of discretion by the trial court in denying an interlocutory injunction seeking to restrain the exercise of the power. Jones v. Camp, 208 Ga. 164, 65 S.E.2d 596 (1951).

Individual debt of one of parties executing security deed. — See Americus Fin. Co. v. Wilson, 189 Ga. 635, 7 S.E.2d 259 (1940); Bank of LaFayette v. Giles, 208 Ga. 674, 69 S.E.2d 78 (1952); Cordele Banking Co. v. Powers, 217 Ga. 616, 124 S.E.2d 275 (1962); Hill v. Perkins, 218 Ga. 354, 127 S.E.2d 909 (1962).

Exercise of Power by Assignee

Formal assignment of deed effectively transfers power of sale contained in deed. — Where a security deed, and the power of sale therein contained, were assigned by the original grantee to a new grantee with the same formality of execution as the deed itself, the power of sale therein contained was one which might properly be exercised by second grantee in the foreclosure proceedings. Williams v. Joel, 89 Ga. App. 329, 79 S.E.2d 401 (1953).

Where power of sale in the security deed executed prior to the act providing that a power of sale may be exercised by the assignee of the instrument was limited to the grantee, the transferee was without power to exercise the power of sale, and consequently, transferee's deed to another in pursuance of the invalid sale did not convey any title. Etheridge v. Boroughs, 209 Ga. 634, 74 S.E.2d 873 (1953).

Under O.C.G.A. §§ 23-2-114 and 44-14-64(b), the assignments of plaintiff homeowner's security deed granted to the defendant bank did not diminish the deed's powers in the bank's foreclosure action; thus, the homeowner's wrongful foreclosure claim failed to state a claim for relief. Milani v. OneWest Bank FSB, 491 Fed. Appx. 977 (11th Cir. 2012) (Unpublished).

When grantee accepts a warranty deed from the grantor and enters thereunder, he succeeds to all the rights and liabilities of grantor in regard to the latter's equity in the property. Williams v. Joel, 89 Ga. App. 329, 79 S.E.2d 401 (1953).

Debtor has no standing to challenge assignment. — Lower court correctly determined that the debtors lacked standing to challenge the assignment of the security deed to a bank because the security deed afforded the debtors no right to dispute the assignment as the debtors

Exercise of Power by Assignee (Cont'd)

were not third-party beneficiaries of the assignment as a whole and were not intended to directly benefit from the transfer of the power of sale. Ames v. JP Morgan Chase Bank, N.A., 298 Ga. 732, 783 S.E.2d 614 (2016).

Assignment of security deed did not prohibit foreclosure sale. — Lender's assignment of a security deed through a custodial agreement that did not prohibit the "Custodian/Trustee" bank from exercising a power of sale authorized the bank to conduct the foreclosure sale. Lynn v. US Bank Nat'l Ass'n, 542 Fed. Appx. 736 (11th Cir. 2013) (Unpublished).

District court properly dismissed the plaintiff's suit against multiple financial institutions and fictitious parties seeking declaratory and equitable relief to stop foreclosure proceedings as there was no dispute that the holder of the security deed at the time of the proposed foreclosure had the authority to foreclose on the property in accordance with the security deed's power of sale. Assignment of the security deed did not diminish the instrument's powers under Georgia law. Stabb v. GMAC Mortg., LLC, 579 Fed. Appx. 706 (11th Cir. 2014) (Unpublished).

Standing to foreclose. — Nominee of a lender had standing to foreclose on the plaintiff's property since a note and the security deed clearly provided that the note could be sold and that the nominee would remain the assignee of any subsequent note holder. The plain language of the security deed unequivocally granted to the nominee the right to foreclose and sell the property in the event of the plaintiff's default. Howard v. Mortg. Elec. Registration Sys., No. 1:10-cv-1630-WSD, 2012 U.S. Dist. LEXIS 116366 (N.D. Ga. Aug. 17, 2012).

Power of sale in a security deed was properly exercised since borrowers were in default and received a timely notice of foreclosure containing the requisite contact information, and there was no requirement to ensure that the foreclosing party was the proper party to foreclose. Sheely v. Bank of Am., N.A., 36 F. Supp. 3d 1364 (N.D. Ga. 2014).

Proof of mailing sufficient. — Trial court did not err in granting summary judgment in favor of the mortgagee in a wrongful foreclosure action because the mortgagee submitted evidence that the mortgagee's attorney mailed written notice of the initiation of foreclosure proceedings on the mortgagor by certified mail and by regular mail to the property address and to the mortgagor's post office box and, although there is no evidence that the mortgagor received any of the notices, the evidence of the proof of mailing was sufficient. Thompson-El v. Bank of Am., N.A., 327 Ga. App. 309, 759 S.E.2d 49 (2014).

Manner of Sale Generally

1. In General

So far as the six-months prohibition of actions against an administrator is concerned, there is no difference between the exercise of a power of sale given in a bill of sale to secure a debt, and the foreclosure of such bill of sale by action. Chapman v. Commercial Nat'l Bank, 86 Ga. App. 178, 71 S.E.2d 109 (1952).

The execution of the power to sell given in a bill of sale to secure debt is not a suit against an administratrix or the estate of the deceased grantor of the power as would require a delay of six months before action can be taken. Chapman v. Commercial Nat'l Bank, 86 Ga. App. 178, 71 S.E.2d 109 (1952).

A power of sale in a security deed must be fairly exercised; and when from the language of an advertisement, without more, it appeared that the security deed was void for the want of a legal grantor, the sale might have been chilled by this circumstance and it should have been enjoined until better advertised. Cocke v. Bank of Dawson, 180 Ga. 714, 180 S.E. 711 (1935).

Time for sale. — When a security deed stipulates that the land may be sold after "first advertising the same once a week for four successive weeks," the notice may provide a time for the sale other than the day provided for public sale. Bush v. Growers' Fin. Corp., 176 Ga. 99, 167 S.E. 105 (1932).

Redemption of property. — When the owner seeking redemption of property sold under a power of sale pleaded an agreement for redemption after sale, made with the trustee in the security deed merely for the purpose of showing that the power of sale was not fairly exercised, and of having the sale annulled, and did not seek specific performance, the petition was not demurrable (now subject to motion to dismiss) because of the agreement's indefiniteness. Holbrook v. Dickson, 195 Ga. 821, 25 S.E.2d 671 (1943).

Evidence of unfair exercise of power of sale. — Finding that the lender's conduct constituted an unfair exercise of the power of sale could be based on evidence that the lender: kept information as to the balance due on the debt from the person responsible therefor, knowing that that person would pay the debt; failed to give proper notice of the time and place of the sale; took personal property from the house after the sale; and bought the property for less than one-fifth of the amount he sold it for shortly after the sale. Brown v. Freedman, 222 Ga. App. 213, 474 S.E.2d 73 (1996).

If a sale by a trustee in a security deed, under a power of sale, was unauthorized, the deed was not void but was merely voidable, and hence should be treated as valid until set aside in a proper proceeding. Fraser v. Rummele, 195 Ga. 839, 25 S.E.2d 662 (1943).

A provision in a security deed for accelerating the maturity of the debt should not be so construed as to work hardship on the borrower, where there has been a bona fide effort on his part to comply with his covenant, and the circumstances are such that his efforts at compliance were apparently acceptable to the lender; in such a case, when there has been no waiver of the covenant by the lender, good faith requires that he should, before undertaking to enforce the provisions of the deed accelerating the maturity of the debt for noncompliance with the terms of the covenant, afford to the borrower a reasonable opportunity to fully meet his obligations thereunder. Tate v. Atlanta Joint Stock Land Bank, 180 Ga. 631, 180 S.E. 112 (1935).

Damages for wrongful foreclosure. — Measure of damages for wrongful foreclosure was the fair market value of the property foreclosed rather than the full bid price at a foreclosure sale to an agent of the grantee, in light of the grantee's subsequent sale of the property to a good faith purchaser which prevented the grantors from redeeming their equity. Tower Fin. Servs., Inc. v. Smith, 204 Ga. App. 910, 423 S.E.2d 257, cert. denied, 204 Ga. App. 922, 423 S.E.2d 257 (1992).

Tort action for wrongful foreclosure. — Where mortgagor did not seek to have foreclosure set aside, but chose to pursue an action in tort "for damages for wrongful foreclosure", mortgagor was not entitled to recover both the property itself and the value of her equity. Calhoun First Nat'l Bank v. Dickens, 264 Ga. 285, 443 S.E.2d 837 (1994).

Fraud was not required as the basis for a wrongful foreclosure action against a materials supplier who had no right to foreclose on the property under improperly recorded security deeds. Sears Mtg. Corp. v. Leeds Bldg. Prods., Inc., 219 Ga. App. 349, 464 S.E.2d 907 (1995), aff'd in part and rev'd in part, 267 Ga. 300, 477 S.E.2d 565 (1996).

It was not necessary that a foreclosure be completed to bring an action for wrongful foreclosure. Sears Mtg. Corp. v. Leeds Bldg. Prods., Inc., 219 Ga. App. 349, 464 S.E.2d 907 (1995), aff'd in part and rev'd in part, 267 Ga. 300, 477 S.E.2d 565 (1996).

Trial court erred in dismissing a pro se borrower's complaint for wrongful foreclosure and breach of contract against the borrower's lender's alleged assignee; the trial court could not consider documents attached to the motion to dismiss, and the complaint adequately alleged failure to give the borrower notice and improper advertising, contrary to O.C.G.A. §§ 44-14-162.2 and 44-14-162(a). Babalola v. HSBC Bank, USA, N.A., 324 Ga. App. 750, 751 S.E.2d 545 (2013).

Borrower in default can maintain wrongful foreclosure action. — Borrower could maintain wrongful foreclosure action, despite being in default on the underlying loan, because the borrower alleged damages were not solely attribut-

Manner of Sale Generally (Cont'd)
1. In General (Cont'd)

able to the borrower's default. LSREF2 Baron, LLC v. Alexander SRP Apts., LLC, 15 F. Supp. 3d 1295 (N.D. Ga. 2013).

Refusal of a creditor to accept loan corporation bonds in lieu of cash will not afford the debtor ground for injunctive relief to prevent a duly advertised sale of land under a valid power of sale contained in security deed. Biddle v. Papa, 180 Ga. 468, 179 S.E. 357 (1935).

Sale not void merely because made on legal holiday. — A sale of property in this state under the power of sale contained in a deed to secure debt is not void because the sale is had on a legal holiday. Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

Payment of surplus received from sale. — Grantee of deeds to secure debt had to pay to grantors the surplus from a foreclosure sale of two properties to the grantee's agent and a subsequent transfer of the properties to third parties for profit. Tower Fin. Servs., Inc. v. Smith, 204 Ga. App. 910, 423 S.E.2d 257, cert. denied, 204 Ga. App. 922, 423 S.E.2d 257 (1992).

2. Mortgage

As a general proposition, the power to mortgage would seem to include in it a power to authorize the mortgagee to sell, on default of payment. Plainville Brick Co. v. Williams, 170 Ga. 75, 152 S.E. 85 (1930).

A power to a mortgagee to sell property mortgaged on failure of the mortgagor to pay the debt at its maturity is a lawful power and is irrevocable, and this power may be exercised against the mortgagor and those claiming under him either by deed or as purchasers at a judicial sale under process to which the mortgage is superior in its lien. Plainville Brick Co. v. Williams, 170 Ga. 75, 152 S.E. 85 (1930).

Even though power of sale in mortgage is conferred upon the grantee for the purpose of facilitating his collection of the amount of the underlying debt which is secured by the property, the power must be exercised fairly; breach of this duty to conduct the sale "fairly" gives rise to a claim for damages to the injured holder of the equity of redemption. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

Intention of parties controls. — That portion of the mortgage containing a power of sale is to be construed so as to effectuate the intention of the parties, and the power must be exercised in accordance with the intention of the parties as indicated in the clause in the mortgage conferring the power. Cadwell v. Swift & Co., 174 Ga. 313, 162 S.E. 814 (1932).

Mortgagee may purchase mortgaged property at sale by him under power of sale in the mortgage, if by the terms of the mortgage he is expressly authorized to do so. Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

Foreclosure notice as published was not confusing because it narrowly defined what would be excluded from the sale as funds, and the notice clearly stated what would be sold as realty included anything defined as realty under Georgia law; thus, the notice's publication could not be the basis for the wrongful foreclosure claim. LSREF2 Baron, LLC v. Alexander SRP Apts., LLC, 15 F. Supp. 3d 1295 (N.D. Ga. 2013).

In absence of specific provision, holder of mortgage with power of sale is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice is not given. Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

Bank has power to change terms of mortgage. — Bank was the entity with full authority to negotiate, amend, or modify the terms of the plaintiffs' mortgage, and nothing in the statute shall be construed to require the bank, as servicer for the loan servicer, to do so. Fenello v. Bank of Am., N.A., 926 F. Supp. 2d 1342 (N.D. Ga. 2013).

3. Adequate Price Required

Foreclosing party has a duty to obtain that amount which results from a sale conducted according to the

terms of the deed and in good faith. — In determining whether this duty under a power of sale has been breached the focus is on the manner in which the sale was conducted and not solely on the result of the sale. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

Foreclosing party is not an insurer of the results of one's exercise of the power of sale; the foreclosing party's only obligation is to sell according to the terms of the deed and in good faith and to obtain the amount produced by such a sale. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

When a power of sale is exercised all that is required of the foreclosing party is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

Allegations of inadequate price insufficient as basis for damages. — If foreclosure sale is conducted according to the terms of the deed and in good faith, alleged failure to obtain an "adequate" price is not a sufficient basis upon which the debtor can base a claim for damages resulting from the exercise of that power. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

Unless price is grossly inadequate. — It is only when foreclosure sale is conducted in such a manner and under such circumstances as to result in a grossly inadequate price that the foreclosing party has breached his duty to the debtor. Massey v. National Homeowners Sales Serv. Corp., 225 Ga. 93, 165 S.E.2d 854 (1969); Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

It is only when the price realized is grossly inadequate and foreclosure sale is accompanied by either fraud, mistake, misapprehension, surprise, or other circumstances which might authorize a finding that such circumstances contributed to bringing about the inadequacy of price that the foreclosing party has breached his duty under the power of sale; it is only in these "circumstances," and not the mere failure to obtain fair market value or an "adequate" price, that a claim for damages arises against the foreclosing party for having failed to properly exercise his power of sale. Kennedy v. Gwinnett Com. Bank, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

Subsequent arrangement did not void sale. — When under a power of sale in a security deed the grantee in case of default was authorized to sell the land described in the deed to the highest bidder "for cash," and the sale was duly advertised and auctioned on that basis, the sale was not rendered invalid by a subsequent arrangement between such grantee and the highest bidder, whereby a note of the latter was accepted in lieu of cash, but the grantee would be accountable for the note as cash in settling with the debtor. Dorsey v. North Am. Life Ins. Co., 217 Ga. 650, 123 S.E.2d 919 (1962).

Escrow impacting power of sale. — When, under a power of sale in a security deed, the grantee in case of default was authorized, on compliance with certain conditions, to sell the land described in the deed to the highest bidder "for cash," and the sale was duly advertised and auctioned on that basis, the sale was not rendered invalid by an agreement between the grantee and the highest bidder that the bidder would place a certain amount as escrow and pay the entire amount upon delivery of the deed, and in case of default would forfeit the amount deposited as escrow. Dorsey v. North Am. Life Ins. Co., 217 Ga. 650, 123 S.E.2d 919 (1962).

When under a power of sale in a security deed the grantee in case of default was authorized on compliance with certain conditions, to sell the land described in the deed to the highest bidder "for cash," and the sale was duly advertised and auctioned on that basis, the sale was not rendered invalid by a subsequent arrangement between such grantee and the highest bidder, not the result of any previous agreement or understanding, whereby a note of the latter was accepted in lieu of cash, but the grantee would be accountable for the note as cash in settling with the debtor. Adcock v. Berry, 194 Ga. 243, 21 S.E.2d 605 (1942).

Causation between conduct and inadequate price. — In a wrongful foreclo-

Manner of Sale Generally (Cont'd)
3. Adequate Price Required (Cont'd)

sure action, the borrower failed to allege a causal connection between defendants' alleged conduct and the grossly inadequate sales price at foreclosure; the borrower had not alleged that other parties were present and ready to bid or that such parties relied on the lender's winning bid. LSREF2 Baron, LLC v. Alexander SRP Apts., LLC, 15 F. Supp. 3d 1295 (N.D. Ga. 2013).

Circumstances of auction. — Plaintiffs' complaint alleged facts that, if true, supported a cause of action by debtor for wrongful foreclosure. In particular, plaintiffs alleged that defendant did not sell the leasehold to the "highest bidder" and violated the contractual duty imposed by paragraph 19 of the security deed by re-auctioning the property and selling the leasehold for a price that was $900,000 less than the sale price of the first auction; additionally, plaintiffs alleged that the circumstances of the auction, such as changing the terms of the sale after accepting a bid of 3.9 million dollars, contributed to the resulting lower price that was accepted by defendant. Colony Bank Worth v. 150 Beachview Holdings, LLC (In re Fry), No. 03-20394, 2007 Bankr. LEXIS 4743 (Bankr. S.D. Ga. Mar. 23, 2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 439.

C.J.S. — 72 C.J.S., Powers, §§ 1, 24 et seq.

ALR. — Power of sale in mortgage or deed of trust as one coupled with interest, 56 A.L.R. 224.

Power to mortgage as authorizing insertion of power of sale in mortgage, 72 A.L.R. 158.

Power of sale as including power to mortgage, 92 A.L.R. 882.

Mortgagee's rights in respect of assumption clause in deed as affected by invalidity or avoidability of clause as between grantor and grantee, 100 A.L.R. 911.

Power of court to sell property in mortgage enforcement suit, or propriety of sale, as affected by opposition of mortgagee or trustee on whom mortgage or deed of trust confers discretion, 103 A.L.R. 1440.

Power of court to authorize pledge or other disposal of property in manner not authorized by trust deed or trust agreement securing bonds or participation certificates, 105 A.L.R. 195.

Exercise of power of sale in mortgage during pendency of suit to foreclose, 107 A.L.R. 721.

Doctrine of equitable conversion as affected by discretion as to time, manner or other circumstances of sale, where the duty to sell is mandatory, 124 A.L.R. 1448.

Power of sale conferred on executor by testator as authorizing private sale, 11 A.L.R.2d 955.

Foreclosure sale or mortgaged real estate as a whole or in parcels, 61 A.L.R.2d 505.

Mortgages: effect upon obligation of guarantor or surety of statute forbidding, or restricting deficiency judgments, 49 A.L.R.3d 554.

Power to appoint realty in fee or personalty absolutely as including power to appoint lesser estate or interest, 94 A.L.R.3d 895.

Recognition of action for damages for wrongful foreclosure — general views, 81 A.L.R.6th 161.

Recognition of action for damages for wrongful foreclosure — types of actions, 82 A.L.R.6th 43.

23-2-115. When private sale authorized.

Unless expressly limited in a will, deed, or other instrument creating a power of sale or unless specifically otherwise provided in such instrument, a power of sale conferred upon an executor, trustee, guardian, or attorney in fact shall authorize a private sale by the

executor, trustee, guardian, or attorney in fact, with or without advertisement and on such terms and conditions as the donee of the power may deem advisable, without the necessity of applying for leave to sell or obtaining any order therefor from any court; provided, however, that this Code section shall not apply to powers of sale in security deeds, mortgages, trust deeds, bills of sale, and other instruments conveying property or creating a lien thereon, to secure a debt or debts.

History. — Ga. L. 1955, p. 430, § 1.

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Powers, § 24 et seq.
ALR. — Doctrine of equitable conversion as affected by discretion as to time, manner or other circumstances of sale, where the duty to sell is mandatory, 124 A.L.R. 1448.

23-2-116. When powers of sale exercisable by successor administrator, trustee, or guardian.

Unless expressly limited in an instrument creating a power of sale or unless specifically otherwise provided in the instrument, the power of sale conferred upon an executor, trustee, or guardian may be exercised and executed by an administrator with the will annexed or by a successor administrator, trustee, or guardian. If the power is conferred upon more than one executor, trustee, or guardian, the surviving or remaining executor or executors, trustee or trustees, or guardian or guardians may exercise and execute the power.

History. — Ga. L. 1955, p. 430, § 2.

23-2-117. When release, relinquishment, or covenant as to exercise of power of appointment authorized.

Any person holding a power of appointment, general or special, whether exercisable by deed or by will only or otherwise, and whether reserved by the holder of the power or conferred upon him by another, may, as to all or any part of the property covered by the power of appointment, release or relinquish the power completely, or may release or relinquish the right to exercise the power except among a limited class set out in the release or relinquishment, or may covenant that the power will be exercised only in favor of the members of a limited class; and any such release, relinquishment, or covenant executed and delivered as provided in Code Sections 23-2-118 and 23-2-119 shall be valid and binding, whether with or without a consideration, provided that no such release, relinquishment, or covenant shall have the effect of permitting the property to be appointed to a person not permitted by the original power.

History. — Ga. L. 1945, p. 340, § 1.

JUDICIAL DECISIONS

Cited in Browne v. Hendley, 216 Ga. 411, 116 S.E.2d 537 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 62 Am. Jur. 2d, Powers, §§ 17, 18.

C.J.S. — 72 C.J.S., Powers, § 19.

ALR. — Statute preventing lapse upon death of legatee or devisee leaving issue as applicable to power of appointment, 75 A.L.R. 1383.

Execution, by donee of power, of deed, mortgage, or will not referring to the power, as exercise thereof, 91 A.L.R. 433; 127 A.L.R. 248.

Nonexclusive powers and illusory appointments, 100 A.L.R. 343.

Right to delegate power to appoint property, 104 A.L.R. 1459.

Power to appoint as exercisable by creation of new power by donee, 169 A.L.R. 727.

Election to take against will as extinguishing power of appointment, 38 A.L.R.2d 977.

Power of appointment as exclusive or nonexclusive — modern views, 69 A.L.R.2d 1285.

Effect of statute upon determination whether disposition of all or residue of testator's property, without referring to power of appointment, sufficiently manifests intention to exercise power, 16 A.L.R.3d 911.

Powers of appointment: revocation or amendment of exercise of power to appoint future interest, after exercise by inter vivos instrument, 60 A.L.R.3d 143.

23-2-118. Release, relinquishment, or covenant as to exercise of power of appointment to be in writing; delivery or recordation.

Any release, relinquishment, or covenant referred to in Code Section 23-2-117 shall be in writing, signed by the person holding the power, and delivered to anyone interested in the power, including any person in the limited class, or to any fiduciary holding the property or any part thereof, or recorded in the office of the clerk of the superior court of the county in which the property or any part thereof is located.

History. — Ga. L. 1945, p. 340, § 2.

23-2-119. When fiduciaries or bona fide purchasers affected by release, relinquishment, or covenant as to exercise of power of appointment.

No fiduciary holding or distributing any property subject to a power of appointment as referred to in Code Section 23-2-117 shall be deemed to have notice of the release, relinquishment, or covenant or be bound thereby unless and until a copy thereof is delivered to the fiduciary. No bona fide purchaser purchasing the property shall be affected by the release, relinquishment, or covenant unless he has notice thereof or

unless the release, relinquishment, or covenant has been recorded in the office of the clerk of the superior court of the county in which the property is located.

History. — Ga. L. 1945, p. 340, § 3.

RESEARCH REFERENCES

ALR. — Nonexclusive powers and illusory appointments, 100 A.L.R. 343.

Validity of exercise of power of appointment as affected by purpose, request, agreement, or condition that appointee benefit, or knowledge that he intends to benefit, one not an object of the power, 115 A.L.R. 930.

Power to appoint realty in fee or personalty absolutely as including power to appoint lesser estate or interest, 94 A.L.R.3d 895.

23-2-120. Application of Code Sections 23-2-117 through 23-2-119.

Code Sections 23-2-117 through 23-2-119 are declaratory of existing law and apply to all such releases, relinquishments, and covenants, whenever executed.

History. — Ga. L. 1945, p. 340, § 4.

ARTICLE 7

NONPERFORMANCE OF CONTRACT

Cross references. — Effect of decree for specific performance as deed to convey land or other property, § 9-11-70. Right of buyer to specific performance in regard to contract for sale of goods, § 11-2-716.

23-2-130. When specific performance decreed generally.

Specific performance of a contract, if within the power of the party, will be decreed, generally, whenever the damages recoverable at law would not be an adequate compensation for nonperformance.

History. — Orig. Code 1863, § 3118; Code 1868, § 3130; Code 1873, § 3186; Code 1882, § 3186; Civil Code 1895, § 4036; Civil Code 1910, § 4633; Code 1933, § 37-801.

JUDICIAL DECISIONS

Analysis

General Consideration
State Patrol Officer Entitled to Sovereign Immunity.
Proof of Contract
Substantial Compliance
Pleading and Practice

General Consideration

This section includes parol as well as written contracts. Valdosta Mach. Co. v. Finley, 164 Ga. 706, 139 S.E. 337 (1927); Richards v. Plaza Hotel, Inc., 171 Ga. 827, 156 S.E. 809 (1931).

Enforcement of oral contract. — An oral contract by the terms of which a person agrees for a valuable consideration that he will make a will giving property to the other contracting party may be enforced by specific performance in this state. First Nat'l Bank & Trust Co. v. Falligant, 208 Ga. 479, 67 S.E.2d 473 (1951).

Alleged oral contract by decedent to provide a college education for child and give jewels to her at decedent's death, if child were named after her, did not measure up to the strict rules of law governing suits to specifically perform alleged contracts of this kind. First Nat'l Bank & Trust Co. v. Falligant, 208 Ga. 479, 67 S.E.2d 473 (1951).

Inadequacy of relief at law essential to equitable relief. — To obtain equitable relief, plaintiff must allege some element or feature of the contract or in the conduct of the defendant to show that the relief at law would not be adequate; he may show that in case the contract is not specifically performed, his damages will be irreparable, or he may show that the measure of damages resulting from the nonperformance of the contract is uncertain or difficult of ascertainment; he may show that the thing contracted for has some intrinsic or special value, such as is possessed by an heirloom, having a special and peculiar value to its owner over and above any market value that can be placed upon it in accordance with strict legal rules; or he may show that the property, though personal, is not of common class, but is unique of its kind, and cannot be readily reproduced, so that others of a similar nature and equal value cannot be procured by damages assessed by means of legal rules, as is the case with paintings or other works of art. Gabrell v. Byers, 178 Ga. 16, 172 S.E. 227 (1933).

When the landlord covenants to maintain the roof in good repair but fails to do so, the remedy of the tenant is to make the repairs himself and look to the landlord for reimbursement, or to occupy the premises without repair and hold the landlord responsible for damages by action or by recoupment to an action for the rent, which remedies are adequate at law. Borochoff Properties, Inc. v. Creative Printing Enters., 233 Ga. 279, 210 S.E.2d 809 (1974).

Monetary damages were not an adequate remedy at law for a county in the county's suit against a contractor seeking specific performance of an agreement to donate to the county a completed wastewater treatment facility for which the county had paid. Moreover, the county was not required to use the county's powers of eminent domain as if the contract had never existed. Forsyth County v. Waterscape Servs., LLC, 303 Ga. App. 623, 694 S.E.2d 102 (2010).

As a general rule, equity will not decree specific performance of contracts relating to personal property. Black v. American Vending Co., 239 Ga. 632, 238 S.E.2d 420 (1977).

Agreement for equal division of property is one which equity will specifically perform since land is involved and damages would not be adequate to compensate for nonperformance. Hancock v. Hancock, 223 Ga. 481, 156 S.E.2d 354 (1967).

A contract which does not provide for a down payment can nevertheless be specifically enforced. Beller & Gould v. Lisenby, 246 Ga. 15, 268 S.E.2d 611 (1980).

Settlement agreement. — An order of specific performance as to a merely private debt in the form of an unincorporated settlement agreement in a divorce proceeding cannot be deemed to be a more adequate remedy than an action at law for breach of contract damages, since that order cannot constitutionally be enforced by contempt and would not obviate the necessity of the obligee's resort to successive lawsuits for the obligor's future breaches. Eickhoff v. Eickhoff, 263 Ga. 498, 435 S.E.2d 914 (1993).

Specific performance of real estate contract. — Property owners were entitled to specific performance under O.C.G.A. § 23-2-130 of a settlement agreement by which a seller agreed to

re-purchase their property for $1 million. The agreement was not procured by duress because the seller was owned by a sophisticated business person who consulted legal counsel. Hampton Island, LLC v. HAOP, LLC, 306 Ga. App. 542, 702 S.E.2d 770 (2010).

In a case involving the breach of a real estate sales contract, the sellers were not entitled to specific performance of the contract as the sellers had an adequate remedy at law because the sellers could have accepted the buyers' tender of the $40,000 in earnest money or the buyers' offer to pay the sellers twice the amount of the earnest money to release the buyers from the contract; there was nothing "unique" about the buyers that would support an order requiring the buyers to purchase the property; and specific performance was not a "lawful remedy" for the sellers to choose as the sellers could have obtained an award of monetary damages that adequately compensated the sellers for the buyers' breach. Sexton v. Sewell, 351 Ga. App. 273, 830 S.E.2d 605 (2019).

New provision regarding reasonableness not applicable. — Based on the date of a defaulted note, which was not superseded or cancelled by the parties' loan modification agreement, the former version of the statute that provided for the lender's attorney's fees controlled, such that a reasonableness determination under the newer version of the statute was not appropriate. Jones v. Bank of Am., N.A., No. 13-12292, 2014 U.S. App. LEXIS 7827 (11th Cir. Apr. 25, 2014) (Unpublished).

No right to specific performance existed. — Under the right for any reason rule, the trial court properly denied the plaintiff's claim for specific performance of a Redemption Agreement because the remaining 29 acres had not been sold; thus, no sales proceeds existed to be distributed. Bagwell v. Trammel, 297 Ga. 873, 778 S.E.2d 173 (2015).

Cited in Watters v. Southern Brighton Mills, 168 Ga. 15, 147 S.E. 87 (1929); Gabrell v. Byers, 178 Ga. 16, 172 S.E. 227 (1933); Hill v. Shaw, 189 Ga. 294, 5 S.E.2d 778 (1939); Averitt v. Swainsboro Methodist Church, 190 Ga. 549, 9 S.E.2d 888 (1940); Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S.E.2d 766 (1940); O'Rear v. Lamb, 194 Ga. 455, 22 S.E.2d 74 (1942); Hotel Candler, Inc. v. Candler, 198 Ga. 339, 31 S.E.2d 693 (1944); Silverman v. Alday, 200 Ga. 711, 38 S.E.2d 419 (1946); Washington Mfg. Co. v. Wickersham, 201 Ga. 635, 40 S.E.2d 206 (1946); Pearson v. George, 209 Ga. 938, 77 S.E.2d 1 (1953); Whiteway Neon-Ad, Inc. v. Maddox, 211 Ga. 27, 83 S.E.2d 676 (1954); Morgan v. Maddox, 216 Ga. 816, 120 S.E.2d 183 (1961); Vowell v. Carmichael, 235 Ga. 387, 219 S.E.2d 732 (1975); Heath v. Stinson, 238 Ga. 364, 233 S.E.2d 178 (1977); Sims v. Holtzclaw, 259 Ga. 537, 384 S.E.2d 656 (1989); Quadron Software Int'l Corp. v. Plotseneder, 256 Ga. App. 284, 568 S.E.2d 178 (2002); 2010-1 SFG Venture LLC v. Lee Bank & Trust Co., 332 Ga. App. 894, 775 S.E.2d 243 (2015).

State Patrol Officer Entitled to Sovereign Immunity.

Bank not entitled to specific performance. — In a breach of contract action, the trial court erred in awarding summary judgment to a bank on the bank's claim for specific performance because the bank did not show that there was no genuine issue of material fact as to the adequacy of damages as the legal remedy for nonperformance. Liberty Capital, LLC v. First Chatham Bank, 338 Ga. App. 48, 789 S.E.2d 303 (2016).

Proof of Contract

Plaintiff seeking to enforce a contract to make a will giving property to him must prove the precise contract beyond a reasonable doubt. Mann v. Moseley, 208 Ga. 420, 67 S.E.2d 128 (1951).

Requirement of certainty. — A court will not decree specific performance of a contract which is indefinite and uncertain in any material provision, or where the parties are not specified, or where, in case of lands or interest in lands, the description thereof, or key found therein, is insufficient to identify the land. Bacon v. Bacon, 176 Ga. 191, 167 S.E. 107 (1932); Cashin v. Markwalter, 208 Ga. 444, 67 S.E.2d 226 (1951).

Proof of Contract (Cont'd)

A description of land as being parts of two named lots in certain district and section of county, that lie north of lessor's present place of business, bounded on the east by highway, on the north by the county line, on the west by lessor's lands, and on the south by the lands of another individual, is too indefinite to support a decree for possession of the lands by the lessee in an equitable action against the lessor. Harris v. Abney, 208 Ga. 518, 67 S.E.2d 724 (1951).

Contract for sale of all of the land known as Wilkinson Pond, consisting of 25 acres, more or less, with the exception of three acres, more or less, to be set aside as a home place containing the Wilkinson home, was void for want of necessary description of any particular land, and afforded no sufficient basis for the extraordinary equitable relief of specific performance. Smith v. Wilkinson, 208 Ga. 489, 67 S.E.2d 698 (1951).

A court will not decree the specific performance of a contract for the sale of land unless there is a definite and specific statement of the terms of the contract. The requirement of certainty extends not only to the subject matter and purpose of the contract, but also to the parties, consideration, and even the time and place of performance, where these are essential. Williams v. Manchester Bldg. Supply Co., 213 Ga. 99, 97 S.E.2d 129 (1957); Duvall v. Cox, 215 Ga. 163, 109 S.E.2d 593 (1959).

Release agreement giving plaintiff option of selecting two acres on east side for release was not too indefinite to be specifically enforced. Jarrard v. Lawson, 244 Ga. 419, 260 S.E.2d 329 (1979).

Specific performance of a contract will not be decreed unless the contract is definite and specific, based upon a sufficient legal consideration, and the proof of it is strong, clear, and satisfactory; if the contract is one entire contract, and one portion of the contract is indefinite, the entire contract fails. First Nat'l Bank & Trust Co. v. Falligant, 208 Ga. 479, 67 S.E.2d 473 (1951).

A contract upon which specific performance is sought must be certain, definite, and clear, and so precise in its terms that neither party can reasonably misunderstand it. Bullard v. Bullard, 202 Ga. 769, 44 S.E.2d 770 (1947); Wehunt v. Pritchett, 208 Ga. 441, 67 S.E.2d 233 (1951); Harris v. Trippi, 209 Ga. 369, 72 S.E.2d 704 (1952).

Where the terms of an option were so vague, uncertain, and indefinite as to be incapable of enforcement, the petition failed to set forth a cause of action for specific performance. Erwin v. Hardin, 187 Ga. 275, 200 S.E. 159 (1938); Williams v. Manchester Bldg. Supply Co., 213 Ga. 99, 97 S.E.2d 129 (1957).

A petition requesting specific performance of a contract for the sale of land which contains no allegation showing the value of the property involved so as to enable this court to determine whether or not the contract is fair, just, and equitable and can, in good conscience, be decreed to be specifically performed, fails to state a cause of action for specific performance. Crown Corp. v. Galanti, 220 Ga. 660, 140 S.E.2d 898 (1965).

Because a handwritten loan agreement did not sufficiently describe the land to be conveyed in the event of a default, and because the lender had an adequate remedy at law in the form of a monetary judgment, the trial court did not err in refusing to grant specific performance. Kirkley v. Jones, 250 Ga. App. 113, 550 S.E.2d 686 (2001).

To constitute a valid sale of real estate which a court will require to be specifically performed, the following are the essentials to the contract of such sale: (1) the memorandum of contract must specify the parties, that is, the seller and the buyer; (2) the memorandum must sufficiently describe the subject matter of the contract; and (3) the memorandum must name the consideration. The consideration need not be expressly stated if the memorandum of contract furnishes a key by which the amount of the purchase price can be ascertained. If the consideration is not all to be paid in cash, then the times and amounts of deferred payments must be specified. When the contract expressly states the amount of purchase money or furnishes a key by which it can be ascertained, then the contract is sufficient. Beller & Gould v.

Lisenby, 246 Ga. 15, 268 S.E.2d 611 (1980).

A document that was simply a purchase offer lacked the elements needed to create a binding and enforceable contract, and neither specific performance nor damages were obtainable based on it. Lee v. Green Land Co., 245 Ga. App. 558, 538 S.E.2d 189 (2000).

Substantial Compliance

Specific performance may properly be refused if a substantial part of the agreed exchange for the performance to be compelled is as yet unperformed and its concurrent or future performance is not well secured to the satisfaction of the court. F. & C. Inv. Co. v. Jones, 210 Ga. 635, 81 S.E.2d 828 (1954).

Substantial compliance must be shown. — The person seeking specific performance of a contract to make a will giving property to him must show, in addition to the contract, a substantial compliance with his part of the agreement. Mann v. Moseley, 208 Ga. 420, 67 S.E.2d 128 (1951).

Tender of purchase price. — Where a contract for the purchase of land provided that the purchaser, upon obtaining a deed from the seller, would execute a deed to secure an unpaid balance of the purchase price, and the seller's deed was delivered, but the purchaser refused to execute the security deed, equity would have jurisdiction of a suit by the seller for specific performance, to enforce the terms of the purchaser's agreement. Waters v. Tillman, 194 Ga. 552, 22 S.E.2d 173 (1942).

While there must be a tender of the purchase price before equity will decree specific performance of a contract for the sale of land, where the petition alleges that the defendants, when notified by the plaintiff that he had purchased from original party his contract with them for the sale of the property, repudiated the contract, notified him that they had no intention of complying with its terms, and that they would refuse to accept the tender of any money under the contract, the tender is waived. Gilleland v. Welch, 199 Ga. 341, 34 S.E.2d 517 (1945); Todd v. Bivins, 215 Ga. 402, 110 S.E.2d 768 (1959).

Before equity will decree specific performance of a contract for the sale of land at the instance of the purchaser, there must, in the absence of waiver, be an unconditional tender of the purchase price. Gilleland v. Welch, 199 Ga. 341, 34 S.E.2d 517 (1945).

Where a petitioner sought specific performance of a conditional contract for the purchase of a described house and lot, but the petition failed to allege that the express condition had been met, no right to the relief sought was set forth. Wehunt v. Pritchett, 208 Ga. 441, 67 S.E.2d 233 (1951).

Pleading and Practice

Specific performance and damages are not inconsistent remedies, and may be pursued in the same action. Loewus v. Eskridge & Downing, Inc., 175 Ga. 456, 165 S.E. 576 (1932).

Specific performance is not a remedy which either party may claim as a matter of absolute right, and mere inadequacy of price, or any other fact showing the contract to be unfair, unjust, or against good conscience, may justify the refusal of this remedy. Whitehead v. Dillard, 178 Ga. 714, 174 S.E. 244 (1934); Wehunt v. Pritchett, 208 Ga. 441, 67 S.E.2d 233 (1951).

Specific performance for sale of land. — When a contract for the sale of land is in writing, is certain and fair in all its parts, is for an adequate consideration, and capable of being performed, it is just as much a matter of course for a court to decree a specific performance of it as it is for a court to give damages for it in other cases. Jones v. Smith, 206 Ga. 162, 56 S.E.2d 462 (1949).

Allegations necessary to defeat motion requesting dismissal of petition. — A petition for specific performance of a contract for the sale of land, is sufficient as against general demurrer (now motion to dismiss), where it is alleged that the contract is in writing, signed by both of the parties, is certain and fair, and is for an adequate consideration and capable of being performed. Scheer v. Doss, 211 Ga. 7, 83 S.E.2d 612 (1954); Todd v. Bivins, 215 Ga. 402, 110 S.E.2d 768 (1959).

Court will not render a decree which is impossible of performance,

Pleading and Practice (Cont'd)

or which the court has no power to enforce. Gabrell v. Byers, 178 Ga. 16, 172 S.E. 227 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, Specific Performance, § 8.

Am. Jur. Pleading and Practice Forms. — 22B Am. Jur. Pleading and Practice Forms, Specific Performance, § 3.

C.J.S. — 81 C.J.S., Specific Performance, § 6 et seq.

ALR. — Right of party who has once refused to perform to have specific performance of contract, 2 A.L.R. 416.

Dismissal of suit as affecting election of remedies as between damages and specific performance, 26 A.L.R. 111.

Specific performance of written executory contract for lease of real property, 31 A.L.R. 502; 173 A.L.R. 1161.

A provision in land contract for pecuniary forfeiture or penalty by a party in default as affecting the right of the other party to specific performance, 32 A.L.R. 584; 98 A.L.R. 877.

Right of beneficiary to enforce contract between third persons to provide for him by will, 33 A.L.R. 739; 73 A.L.R. 1395.

Infancy of party to contract as affecting his right to specific enforcement, 43 A.L.R. 120.

Obligation of assignee to vendor to perform contract on assignment by purchaser of contract to sell real property, 59 A.L.R. 954.

Specific performance of a contract as a matter of right, 65 A.L.R. 7.

Remedies during promisor's lifetime for breach of agreement to give property at death, 66 A.L.R. 1439.

Right to return in specie of the consideration received by a political subdivision under an invalid or unenforceable contract, or to declaration of trust or other right in respect of property into which consideration has been converted, 93 A.L.R. 441.

Remedy by mandatory injunction or specific performance for breach of contract to furnish one the requirements of his business, 98 A.L.R. 421.

Right to specific performance, or injunction against breach, of lease or sublease or of contract to make lease as affected by right of complainant to cancel lease before expiration of term for which other party is bound, 117 A.L.R. 256.

Specific performance of contract for sale of corporate stock, 130 A.L.R. 920.

Specific performance of contract for services, 135 A.L.R. 279.

Remedy of specific performance as available to vendee's assignee, 138 A.L.R. 205.

Contract for exclusive distribution or sales agency as subject of suit for specific performance, 145 A.L.R. 684.

Specific performance, or other equitable enforcement, of agreement for wife's support or alimony, 154 A.L.R. 323.

Insolvency of defendant as a reason for denying specific performance, 154 A.L.R. 1201.

Specific performance or injunction as proper remedy for breach of collective bargaining agreement, 156 A.L.R. 652.

Specific performance, or injunction against breach, of contract for organization or reorganization of corporation, 158 A.L.R. 997.

Specific performance of contracts requiring building or construction, 164 A.L.R. 802.

Remedies during promisor's lifetime on contract to convey or will property at death in consideration of support or services, 7 A.L.R.2d 1166.

Specific performance or injunctive relief against breach of contract, other than lease or agreement therefor, or contract for services, terminable by one party but not the other, 8 A.L.R.2d 1208.

Option executed simultaneously with mortgage for purchase of mortgaged property by mortgagee as subject of specific performance, 10 A.L.R.2d 231.

Change of conditions after execution of contract or option for sale of real property as affecting right to specific performance, 11 A.L.R.2d 390.

Mutuality of remedy as essential to

granting of specific performance, 22 A.L.R.2d 508.

Specific performance of provisions of separation agreement other than those for support or alimony, 44 A.L.R.2d 1091.

Specific performance of compromise and settlement agreement, 48 A.L.R.2d 1211.

Uncertainty as to terms of mortgage or of accompanying note or bond contemplated by real-estate sales contract as affecting right to specific performance, 60 A.L.R.2d 251.

Specific performance: requisite definiteness of provision in contract for sale or lease of land, that vendor or landlord will subordinate his interest to permit other party to obtain financing, 26 A.L.R.3d 855.

Purchaser's misrepresentations as to intended use of real property as ground for vendor's equitable relief from contract and deed, 35 A.L.R.3d 1369.

Specific performance of lease of, or binding option to lease, building or part of building to be constructed, 38 A.L.R.3d 1052.

Specific performance of agreement for sale of private franchise, 82 A.L.R.3d 1102.

Specific performance of agreement to lend or borrow money, 82 A.L.R.3d 1116.

Requirements as to certainty and completeness of terms of lease in agreement to lease, 85 A.L.R.3d 414.

Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance, 11 A.L.R.4th 891.

23-2-131. When specific performance of parol contract for land decreed; sufficient part performance.

(a) The specific performance of a parol contract as to land shall be decreed if the defendant admits the contract or if the contract has been so far executed by the party seeking relief and at the instance or by the inducements of the other party that if the contract were abandoned he could not be restored to his former position.

(b) Full payment alone accepted by the vendor, or partial payment accompanied with possession, or possession alone with valuable improvements, if clearly proved in each case to have been done with reference to the parol contract, shall be sufficient part performance to justify a decree.

History. — Orig. Code 1863, § 3119; Code 1868, § 3131; Code 1873, § 3187; Code 1882, § 3187; Civil Code 1895, § 4037; Civil Code 1910, § 4634; Code 1933, § 37-802.

Cross references. — Form of complaint for specific performance of written contract to convey land, § 9-11-112.

Law reviews. — For survey article on real property, see 34 Mercer L. Rev. 255 (1982).

JUDICIAL DECISIONS

Construction with O.C.G.A. § 53-4-30. — More specific provisions of O.C.G.A. § 53-4-30 addressing contracts to make a will control over the more general provisions of O.C.G.A. §§ 23-2-131 and 23-2-132 addressing any parol contract as to land and any voluntary agreement or merely gratuitous contract to land, respectively; thus, the equitable relief of specific performance is not available as a means of enforcing an oral will contract. Newton v. Lawson, 313 Ga. App. 29, 720 S.E.2d 353 (2011).

Partial payment and possession. — While payment of a part of the purchase-money is not alone such part performance as will take the case out of the statute of frauds, partial payment of

the purchase-money accompanied with possession will amount to such part performance as to take the contract out of the statute and to authorize the specific performance of a parol contract. Smith v. Cox, 247 Ga. 563, 277 S.E.2d 512 (1981).

Payment in full on oral contract for sale of land. — In a suit for specific performance brought by a plaintiff seeking to enforce an alleged oral contract to sell real property, the trial court erred in granting summary judgment to the defendant based on the Statute of Frauds preventing recovery to the plaintiff; the plaintiff had presented evidence establishing the existence of an oral contract for the sale of the property and that it was excepted from the Statute of Frauds based on the plaintiff's performance of paying for the property in full, and thus, issues of fact remained as to whether defendant's decedent had accepted performance through payments received by a sibling and whether, in light of the plaintiff's previous tenancy, the plaintiff's performance was inconsistent with the lack of a contract to sell the property. Edwards v. Sewell, 289 Ga. App. 128, 656 S.E.2d 246 (2008).

Possession with valuable improvements. — When a party seeking specific performance of an oral contract to sell realty relies on the principle of possession with improvements, it must be shown that the possession and improvement arose by virtue of and in the faith of the oral contract or promise, so as to take the case out of the statute of frauds and constitute the equivalent of a writing by showing acts unequivocally referring to the alleged contract or promise; thus, where a party takes possession under an oral contract to rent, and also alleged an oral option to purchase, the possession is under the tenancy and cannot also be shown to be in reliance on the option. Smith v. Cox, 247 Ga. 563, 277 S.E.2d 512 (1981).

Proof of possession in reliance on the oral option to purchase is required of a party claiming specific performance of an alleged option agreement under subsection (b) of O.C.G.A. § 23-2-131. Engram v. Engram, 265 Ga. 804, 463 S.E.2d 12 (1995).

Creation of parol license to use land did not interfere with existing right of first refusal. — In a suit brought by a property owner seeking to specifically perform an oral agreement to purchase a strip of real estate, the trial court properly denied the property owner's request for an interlocutory judgment based on a violation of the statute of frauds and because another held a first right of refusal over the sale/purchase of the property. However, the trial court erred by concluding that the property owner had not obtained a parol license to use the strip since the property owner had made expenditures to improve the land and, as to the right of first refusal held by another, the grant of a parol license was not the equivalent to a sale of the property to have in anyway interfered with that right. Meinhardt v. Christianson, 289 Ga. App. 238, 656 S.E.2d 568 (2008).

Sufficiency of complaint. — Plaintiff's complaint alleging that she entered into a parol agreement with her husband to dissolve the marriage, divide the marital estate, and arrange for child support, that she possessed the property and paid the mortgage pursuant to the agreement, and that she maintained and improved the property, stated a claim under O.C.G.A. § 23-2-131. Coleman v. Coleman, 265 Ga. 568, 459 S.E.2d 166 (1995).

Specific performance warranted. — Plaintiff's possession and partial payment, as well as plaintiff's possession with valuable improvements, and the payment of tax and mortgage arrears satisfied the requirements for an order of specific performance of an oral contract for the sale of land. Dobbs v. Dobbs, 270 Ga. 887, 515 S.E.2d 384 (1999).

Under an oral agreement, the only performance which plaintiff had yet to complete was his payment of the remaining portion of the agreed purchase price and that payment was not due until closing; therefore, the trial court properly granted summary judgment on plaintiff's claim for specific performance. Braddy v. Boynton, 271 Ga. 55, 515 S.E.2d 394 (1999).

Because a contractor's performance and an owner's acceptance of that performance satisfied the requirements of the statute of frauds, O.C.G.A. § 13-5-31, and the plats and deeds established the requisite description of the properties to be

exchanged, the contractor was entitled to specific performance under O.C.G.A. § 23-2-131(a). Masters v. Redwine, 279 Ga. 432, 615 S.E.2d 118 (2005).

Superior court did not err in granting a purchaser summary judgment in the purchaser's action seeking specific performance pursuant to O.C.G.A. § 23-2-131 and requiring a mortgage company to deliver a deed conveying certain property because the company failed to demonstrate any merit in the company's contention that the superior court improperly refused to invoke the court's equitable power to relieve the company from performing under the foreclosure sale contract on the ground that the opening bid the company set forth was a mistake. Because the dollar amount of the high bid at the foreclosure sale alone made it immediately apparent that there had been a mistake, a reasonable inference arose that had reasonable diligence been employed before the foreclosure sale, the alleged unilateral mistake would not have occurred. Decision One Mortg. Co., LLC v. Victor Warren Props., Inc., 304 Ga. App. 423, 696 S.E.2d 145 (2010).

Specific performance not warranted. — Specific performance of a low-cost lease of property was not merited because plaintiff had been paid back for the investment in commencing a landfill on the property and did not argue that an award of money damages was not sufficient. Elliott v. McDaniel, 224 Ga. App. 848, 483 S.E.2d 104 (1997), rev'd on other grounds, 269 Ga. 262, 497 S.E.2d 786 (1998).

Where the defendant simply made a bid for the property at a nonjudicial foreclosure sale, which was accepted by the seller, no partial performance of the contract occurred and the transaction, therefore, stayed within the confines of the statute of frauds. James v. Safari Enters., Inc., 244 Ga. App. 813, 537 S.E.2d 103 (2000).

The trial court did not err in directing a verdict against a counterclaim to enforce an oral agreement between the parties to reconvey property to the defendant, notwithstanding proof of part performance by the defendant consisting of the defendant's continued possession after conveying the property plus making monthly payments to the plaintiff of approximately $450, since, although this was consistent with the existence of an oral agreement to convey the property back to the defendant after a loan was paid off, it was also consistent with the lack of such an agreement, since monthly payments approximating rent did not establish part performance of the alleged oral agreement to reconvey the property to the defendant. Rose v. Cain, 247 Ga. App. 481, 544 S.E.2d 453 (2001).

When a party who leased certain land from its supposed owner, who could not read, attempted to enforce an option to purchase the land, which was included in documents the lessee gave the owner to sign, the lessee's partial payment, possession of, and improvements to the land did not entitle the lessee to enforce the contract under O.C.G.A. § 23-2-131(a) because the lessee was not trying to enforce an oral contract, to which the statute referred, and the lessee's possession and payment arose by virtue of the lease provision of the parties' agreement, rather than any option to purchase. Makowski v. Waldrop, 262 Ga. App. 130, 584 S.E.2d 714 (2003).

A trial court erred in finding that a lease-purchase agreement was enforceable because, though it satisfied the statute of frauds, it was invalid for failure of consideration in that the lessee/proposed purchaser never paid the rent owed nor any of the property taxes, which not only invalidated the agreement but voided the purchase option under O.C.G.A. § 13-1-8(a). Further, the trial court erred in holding that the lessee/proposed purchaser was entitled to specific performance of the agreement based on repairs made since there was no legal authority to support the trial court's proposition that part performance of an otherwise unenforceable written agreement, as modified by subsequent oral agreements between the parties, transformed it into an enforceable parol contract. Estate of Ryan v. Shuman, 288 Ga. App. 868, 655 S.E.2d 644 (2007), cert. denied, No. S08C0664, 2008 Ga. LEXIS 482 (Ga. 2008).

Decedent's son, grandson, and friend were not entitled to specific performance

of a will contract because they could not meet the requirements of O.C.G.A. §§ 23-2-131 and 23-2-132; appellants failed to show that the appellants had possession of the decedent's property and that the appellants made valuable improvements thereto simply by virtue of the decedent's promise to use the decedent's will to leave the appellants a life estate. Newton v. Lawson, 313 Ga. App. 29, 720 S.E.2d 353 (2011).

Conflicting theories about land ownership was jury matter. — Trial court properly allowed argument and a jury instruction on O.C.G.A. § 53-4-30 as the parties agreed that an individual's former father-in-law promised to convey certain property to the individual and his ex-wife, upon the father-in-law's death; the jury could resolve any conflicting theories as to the ownership of the land and the applicability of O.C.G.A. §§ 23-2-131(a) and 23-2-132. Jackson v. Neese, 276 Ga. App. 724, 624 S.E.2d 139 (2005).

Cited in Shivers v. Webster, 224 Ga. App. 254, 480 S.E.2d 304 (1997); Pettigrew v. Collins, 246 Ga. App. 207, 539 S.E.2d 214 (2000).

RESEARCH REFERENCES

ALR. — Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance, 11 A.L.R.4th 891.

23-2-132. When voluntary agreement enforced.

Specific performance will not be decreed of a voluntary agreement or merely gratuitous promise. If, however, possession of lands has been given under such an agreement, upon a meritorious consideration, and valuable improvements have been made upon the faith thereof, equity will decree the performance of the agreement.

History. — Orig. Code 1863, § 3121; Code 1868, § 3133; Code 1873, § 3189; Code 1882, § 3189; Civil Code 1895, § 4039; Civil Code 1910, § 4636; Code 1933, § 37-804.

JUDICIAL DECISIONS

Analysis

General Consideration
Proof Generally
Meritorious Consideration
Valuable Improvements

General Consideration

Construction with O.C.G.A. § 53-4-30. — More specific provisions of O.C.G.A. § 53-4-30 addressing contracts to make a will control over the more general provisions of O.C.G.A. §§ 23-2-131 and 23-2-132 addressing any parol contract as to land and any voluntary agreement or merely gratuitous contract to land, respectively; thus, the equitable relief of specific performance is not available as a means of enforcing an oral will contract. Newton v. Lawson, 313 Ga. App. 29, 720 S.E.2d 353 (2011).

Possession and valuable improvements must be based on oral contract or promise. — When possession and valuable improvements are relied upon for specific performance they must have been by virtue of and on the faith of the oral contract or promise so as to take the case out of the statute of frauds and con-

stitute the equivalent of a writing by showing acts unequivocally referring to the alleged contract or promise. The burden rested on the alleged promisee to bring one's case within these facts if one did not show other exceptions under Code 1933, § 37-802 (see O.C.G.A. § 23-2-131); and without such proof one was not entitled to specific performance. Taylor v. Cureton, 196 Ga. 28, 25 S.E.2d 815 (1943).

Oral gift of land becomes complete and irrevocable when donee takes possession of donated premises and, on faith of the gift, makes valuable improvements; and, as against the donor and those claiming under him with notice, a completed gift of land invests the donee with a perfect equitable title. Sharpton v. Givens, 209 Ga. 868, 76 S.E.2d 806 (1953); Owens v. White, 218 Ga. 1, 126 S.E.2d 425 (1962); Sharp v. Sumner, 272 Ga. 338, 528 S.E.2d 791 (2000).

Legal title does not pass merely by parol gift and making of improvements. A decree of specific performance is necessary to pass the legal title. Doe v. Newton, 171 Ga. 418, 156 S.E. 25 (1930); Beetles v. Steadham, 186 Ga. 110, 197 S.E. 270 (1938).

Laches will bar petition for specific performance by one who claims land under voluntary conveyance. Prater v. Sears, 77 Ga. 28 (1886).

As a general rule, equity will not decree specific performance of contracts relating to personal property. Black v. American Vending Co., 239 Ga. 632, 238 S.E.2d 420 (1977).

Gratuitous promise by insured to give the insured's life insurance to the insured's estate cannot be specifically enforced. Nally v. Nally, 74 Ga. 669, 58 Am. R. 458 (1885).

Agreement to settle family controversy will not be considered voluntary and without consideration, but will be enforced in equity as a fair family arrangement independent of its being a compromise of doubtful rights. Jones v. Robinson, 172 Ga. 746, 158 S.E. 752 (1931).

Party not entitled to have contract of gratuitous offer to lease specifically performed. R.A.C. Realty Co. v. W.O.U.F. Atlanta Realty Corp., 205 Ga. 154, 52 S.E.2d 617 (1949).

Sufficiency of complaint. — Plaintiff's complaint alleging that she entered into a parol agreement with her husband to dissolve the marriage, divide the marital estate, and arrange for child support, that she possessed the property and paid the mortgage pursuant to the agreement, and that she maintained and improved the property, stated a claim under O.C.G.A. § 23-2-132. Coleman v. Coleman, 265 Ga. 568, 459 S.E.2d 166 (1995).

Cited in Chan v. Judge, 36 Ga. App. 13, 134 S.E. 925 (1926); Burt v. Gooch, 37 Ga. App. 301, 139 S.E. 912 (1927); Payne v. Thebaut, 180 Ga. 758, 180 S.E. 725 (1935); Kendrick v. Blackwell, 189 Ga. 225, 5 S.E.2d 633 (1939); Trustees of Jesse Parker Williams Hosp. v. Nisbet, 189 Ga. 807, 7 S.E.2d 737 (1940); Moore v. Segars, 192 Ga. 190, 14 S.E.2d 752 (1941); Johns v. Nix, 194 Ga. 152, 20 S.E.2d 758 (1942); Holton v. Mercer, 195 Ga. 47, 23 S.E.2d 166 (1942); Jones v. Jones, 196 Ga. 492, 26 S.E.2d 602 (1943); Christopher v. Whitmire, 199 Ga. 280, 34 S.E.2d 100 (1945); North v. Tolbert, 80 Ga. App. 110, 55 S.E.2d 661 (1949); Matlock v. Duncan, 220 Ga. 200, 137 S.E.2d 661 (1964); Gillis v. Buchheit, 232 Ga. App. 126, 500 S.E.2d 38 (1998).

Proof Generally

Burden of proof generally. — Evidence which shows all of the requirements necessary to establish a complete equity to land under a parol gift can be offered as a defense to a dispossessory proceeding. The establishment of a complete equity shifts to the plaintiffs the burden of showing some superior right or title to defeat or overcome the defendant's right. Ogden v. Dodge County, 97 Ga. 461, 25 S.E. 321 (1895); Holton v. Mercer, 65 Ga. App. 53, 15 S.E.2d 253 (1941); Milton v. Milton, 192 Ga. 778, 16 S.E.2d 573 (1941).

When title is claimed by virtue of provisions of this section, parol gift thus asserted must be established by evidence which shows its existence beyond reasonable doubt. Causey v. Causey, 224 Ga. 458, 162 S.E.2d 372 (1968).

Contract must be certain. — The terms of a gift or parol contract "should be

Proof Generally (Cont'd)

established so clearly, strongly and satisfactorily as to leave no reasonable doubt as to the agreement." Harden v. Morton, 195 Ga. 471, 24 S.E.2d 685 (1943).

Petition for specific performance of promise to convey land, to be sufficient as against demurrer (now motion to dismiss), must allege: (1) the promise to give, (2) a meritorious consideration, (3) possession in one's own right by the donee, and (4) the making of valuable improvements. Mankin v. Bryant, 206 Ga. 120, 56 S.E.2d 447 (1949); Yates v. Yates, 214 Ga. 843, 108 S.E.2d 330 (1959).

In order to prevail, it is necessary to establish each of its requirements to authorize a decree of performance of the parol gift; furthermore, when title is claimed by virtue of this section, the parol gift thus asserted must be established by evidence which shows its existence beyond a reasonable doubt. Taylor v. Cureton, 196 Ga. 28, 25 S.E.2d 815 (1943); Causey v. Causey, 224 Ga. 458, 162 S.E.2d 372 (1968); Brown v. Truluck, 239 Ga. 105, 236 S.E.2d 60 (1977).

Possession of land under a voluntary agreement, based upon a meritorious consideration, with valuable improvements made upon the faith thereof, will invest the holder with such right or equity that he cannot be ousted by the donor, or by a purchaser from him with notice. However, a mere parol gift is not, without more, sufficient to pass title, nor will it vest in the donee any right or equity as against a subsequent purchaser from the donor, with or without notice. Beetles v. Steadham, 186 Ga. 110, 197 S.E. 270 (1938).

A parol gift of land in praesenti, based upon a meritorious consideration and accompanied by possession, but with no valuable improvements made upon the land during the lifetime of the alleged donor, will not authorize a decree of title in the donee. Mulligan v. Mulligan, 201 Ga. 444, 39 S.E.2d 699 (1946).

In action to enjoin trespass on a certain acre of land, where plaintiff's predecessor in title had orally given the land to a church for cemetery uses, pursuant to which gift corner stakes and lines were set up and two graves placed thereon, and there was testimony that plaintiff prior to his purchase of larger tract of which the acre was a part was informed of this gift and saw the graves, a verdict for the defendants was authorized by the evidence. Sharpton v. Givens, 209 Ga. 868, 76 S.E.2d 806 (1953).

Conflicting theories about land ownership was jury matter. — Trial court properly allowed argument and a jury instruction on O.C.G.A. § 53-4-30 as the parties agreed that an individual's former father-in-law promised to convey certain property to the individual and his ex-wife, upon the father-in-law's death; the jury could resolve any conflicting theories as to the ownership of the land and the applicability of O.C.G.A. §§ 23-2-131(a) and 23-2-132. Jackson v. Neese, 276 Ga. App. 724, 624 S.E.2d 139 (2005).

Sufficient proof established gift of land. — Although there was no purchase money resulting trust created under former O.C.G.A. §§ 53-12-90, 53-12-91, and 53-12-92 (see O.C.G.A. §§ 53-12-2, 53-12-130, and 53-12-131), a decedent's mother was entitled to an equity interest in property of the deceased daughter because a constructive trust was established under former O.C.G.A. § 53-12-93(a) (see O.C.G.A. § 53-12-132) and there was evidence of a gift of land under O.C.G.A. § 23-2-132, as an exception to the statute of frauds, in that the mother lived on the property, made valuable improvements, and paid meritorious consideration. Oliver v. 4708 Old Highgate Entry, No. 1:07-cv-2117-ODE, 2009 U.S. Dist. LEXIS 73002 (N.D. Ga. Apr. 21, 2009).

Meritorious Consideration

Natural affection as meritorious consideration. — In an action for specific performance of an alleged parol promise to give land, the natural love and affection of a father for his son supplies the element of meritorious consideration. Milton v. Milton, 192 Ga. 778, 16 S.E.2d 573 (1941).

Labor, expenditures, love and affection. — Wife's provision of labor, expenditures and natural love and affection amounted to meritorious consideration for

a valid oral gift of a one half undivided interest in husband's property. United States v. 1419 Mount Alto Rd., 830 F. Supp. 1476 (N.D. Ga. 1993).

Damage or trouble to the promisee, as well as benefit to the promisor, is a sufficient consideration to support a promise. Mankin v. Bryant, 206 Ga. 120, 56 S.E.2d 447 (1949).

Valuable Improvements

Section requires permanent and beneficial improvements. — Where petition alleged that plaintiff, relying upon the promise of the corporation to convey to him certain property, went into possession thereof and made valuable improvements thereon, it alleges a benefit to the corporation by reason of the enhancement in value of its remaining property because of the valuable improvements made by the plaintiff, and an injury to the plaintiff, by reason of the valuable improvements made by him in reliance upon the promise. Mankin v. Bryant, 206 Ga. 120, 56 S.E.2d 447 (1949).

Slight improvements of small value, if they are substantial and permanent in their nature and are beneficial to the land, in other words, if they are such as an owner would ordinarily make upon the land under like circumstances, then these improvements are sufficient to comply with the requirements that plaintiff made valuable improvements. Davis v. Newton, 215 Ga. 58, 108 S.E.2d 809 (1959).

Sufficiency of improvements which donee must have made to complete parol gift of land is question for jury to determine. Sharpton v. Givens, 209 Ga. 868, 76 S.E.2d 806 (1953); Barfield v. Hilton, 235 Ga. 407, 219 S.E.2d 719 (1975).

RESEARCH REFERENCES

C.J.S. — 81 C.J.S., Specific Performance, § 46.

ALR. — Early death of vendor as affecting enforcement of contract to convey in consideration of contract for his or her support for life, 49 A.L.R. 601.

Broker's right to commission where customer repudiates or fails to complete contract or promise which is oral or not specifically enforceable, 12 A.L.R.2d 1410.

Validity and enforceability of contract which expressly leaves open for future agreement or negotiation the terms of payment for property, 68 A.L.R.2d 1221.

23-2-133. Inadequacy of price; unfair or unjust contracts.

Mere inadequacy of price, though not sufficient to rescind a contract, may justify a court in refusing to decree a specific performance, as may any other fact showing the contract to be unfair, unjust, or against good conscience.

History. — Orig. Code 1863, § 3122; Code 1868, § 3134; Code 1873, § 3190; Code 1882, § 3190; Civil Code 1895, § 4040; Civil Code 1910, § 4637; Code 1933, § 37-805.

Law reviews. — For comment on Jones v. Smith, 206 Ga. 162, 56 S.E.2d 462 (1949), see 12 Ga. B.J. 333 (1950).

JUDICIAL DECISIONS

Analysis

General Consideration
Inadequacy of Price Generally
Determination of Fairness

General Consideration

This section embraces more than inadequacy of price; it also covers fairness of contract as to both parties. Jones v. Smith, 206 Ga. 162, 56 S.E.2d 462 (1949), commented on in 12 Ga. B.J. 333 (1950); Horner v. Savannah Valley Enters., Inc., 234 Ga. 371, 216 S.E.2d 113 (1975).

Specific performance is not remedy which either party can demand as matter of absolute right, and will not in any given case be granted unless strictly equitable and just. Bullard v. Bullard, 202 Ga. 769, 44 S.E.2d 770 (1947); Jones v. Smith, 206 Ga. 162, 56 S.E.2d 462 (1949); Treadwell v. Treadwell, 216 Ga. 156, 115 S.E.2d 535 (1960).

One who seeks aid of equity must come into court with clean hands. Byck v. Lawton, 218 Ga. 858, 131 S.E.2d 176 (1963).

If family settlement is involved, court will not inquire into adequacy or inadequacy of consideration. Hancock v. Hancock, 223 Ga. 481, 156 S.E.2d 354 (1967).

When equity takes jurisdiction to give specific performance it will retain it until full and satisfactory justice is accomplished between the parties. McDonald v. Davis, 43 Ga. 356 (1871); Miller v. Watson, 139 Ga. 29, 76 S.E. 585 (1912).

Cited in Hulgan v. Gledhill, 207 Ga. 349, 61 S.E.2d 473 (1950); Bailey v. Bell, 208 Ga. 715, 69 S.E.2d 272 (1952); Payne v. Jones, 211 Ga. 322, 86 S.E.2d 3 (1955); Sikes v. Sims, 212 Ga. 391, 93 S.E.2d 6 (1956); Burnam v. Wilkerson, 220 Ga. 590, 140 S.E.2d 871 (1965); Abdill v. Barden, 221 Ga. 591, 146 S.E.2d 299 (1965); Anthony v. Morris Hyles, Inc., 221 Ga. 847, 148 S.E.2d 326 (1966); Logan v. Phillips, 222 Ga. 714, 152 S.E.2d 384 (1966); Logan v. Logan, 223 Ga. 574, 156 S.E.2d 913 (1967); Penta Invs., Inc. v. Robertson, 230 Ga. 401, 197 S.E.2d 358 (1973); Deal v. Dickson, 231 Ga. 366, 202 S.E.2d 41 (1973); Moore v. Buiso, 235 Ga. 730, 221 S.E.2d 414 (1975); Kelly v. Vargo, 261 Ga. 422, 405 S.E.2d 36 (1991); Owenby v. Holley, 256 Ga. App. 13, 567 S.E.2d 351 (2002).

Inadequacy of Price Generally

Specific performance of contract may be refused when consideration is inadequate, though the court will not rescind it. Hunt v. Jackson Formby's Guardian, 43 Ga. 79 (1871).

Court should not deny decree for specific performance merely upon ground of inadequacy of consideration, unless there is such a gross disparity of consideration as to shock the moral conscience and to amount in itself to evidence of fraud, the adequacy of consideration being generally a matter to be determined by the parties for themselves. Whitehead v. Dillard, 178 Ga. 714, 174 S.E. 244 (1934); McLoon v. McLoon, 220 Ga. 18, 136 S.E.2d 740 (1964).

Specific performance may be denied when gross inadequacy shown. — When the inadequacy of price is so great as to give to the contract the character of unreasonableness and hardship, the court and jury will stay the exercise of their discretionary power in enforcing a specific performance. Hotaling v. Anderson, 226 Ga. 327, 175 S.E.2d 5 (1970).

Shareholders failed to rebut corporations showing price offered for shares was fair. — Corporation was properly granted specific performance of a shareholder agreement requiring the corporation's former employees to sell back their shares at the price the corporation offered as the corporation submitted an affidavit calculating the corporation's "going concern" value—the formula for determining share value set out in the shareholder agreement—and the employees offered no evidence countering the affidavit. Furthermore, since there were no allegations that there was anything unfair, unjust, or violative of the conscience about the agreement, the shareholders' equitable defenses were inapplicable to the corporation's claim for specific performance of the agreement. Clawson v. Intercat, Inc., 294 Ga. App. 624, 669 S.E.2d 671 (2008), cert. denied, No. S09C0462, 2009 Ga. LEXIS 199 (Ga. 2009).

Determination of Fairness

Case by case method of determination of fairness. — A provision in a

contract for deferred payments, without a provision for security to the seller, does not necessarily make a contract inequitable, unjust, and unenforceable. The particular circumstances of the case would determine whether such a contract is fair and just to both parties. Chewning v. Brand, 230 Ga. 255, 196 S.E.2d 399 (1973).

Equity will never decree specific performance of fraudulent, illegal, or hard and unconscionable bargain. Swint v. Carr, 76 Ga. 322, 2 Am. St. R. 44 (1886).

Contract upon which specific performance is sought must be certain, definite, and clear, and so precise in its terms that neither party can reasonably misunderstand it. Estes v. Winn, 136 Ga. 344, 71 S.E. 470 (1911); Miller v. Watson, 139 Ga. 29, 76 S.E. 585 (1912); Treadwell v. Treadwell, 216 Ga. 156, 115 S.E.2d 535 (1960).

Petition which did not give with precision the terms of contract for sale of land or its date, and which did not allege the extent and value of the services rendered or the value of the lands involved, which values must be set forth in order to show that the contract which it sought to enforce is one not unfair, unjust, or against good conscience, did not state a cause of action for specific performance. Johns v. Nix, 196 Ga. 417, 26 S.E.2d 526 (1943); Jenkins v. Evans, 202 Ga. 423, 43 S.E.2d 501 (1947); Howington v. Juhan, 218 Ga. 748, 130 S.E.2d 822 (1963); Walker v. Bush, 234 Ga. 366, 210 S.E.2d 285 (1975); Moody v. Mendenhall, 238 Ga. 689, 234 S.E.2d 905 (1977).

Where a petition for specific performance of an alleged lease of lands, to be used by the lessee for an airfield does not allege any sum of money to be the fair, just, and equitable rental value of the lands, and the alleged lease provides that the lessor shall be paid 10 percent of the passenger traffic, and 5 percent for instructions, there is nothing upon which to base a decision that the contract is fair, just, and equitable, and in good conscience should be performed. Harris v. Abney, 208 Ga. 518, 67 S.E.2d 724 (1951).

In order for a suit for specific performance of a contract for the sale of land to prevail, the plaintiff must prove the value of the property so as to enable the court to determine that the contract was fair, just, and not against good conscience. Morgan v. Mitchell, 209 Ga. 348, 72 S.E.2d 310 (1952); Jones v. Dallas, 243 Ga. 124, 252 S.E.2d 603 (1979).

Where there was a lack of necessary and indispensable allegations as to adequacy of consideration, the petition failed to state a cause of action for specific performance of an option to sell property, the only relief sought; and the court should have sustained the defendants' general demurrer (now motion to dismiss) raising that question and dismissed the petition. Alexander v. American Legion Post No. 28, 209 Ga. 285, 71 S.E.2d 627 (1952).

Where the alleged contract sued on is based on an oral agreement to convey or devise land in consideration of the performance of ordinary personal services, the petition must not only show that the contract is precise in its terms, but must also allege the value of such service and the value of the land or specific data from which such relative values can be determined. Treadwell v. Treadwell, 216 Ga. 156, 115 S.E.2d 535 (1960).

Summary judgment inappropriate when fairness and value issues remain. — Trial court erred in granting summary judgment to the option holder on the holder's specific performance claim against the option grantors; issues of fairness and value remained regarding the option contract, thus precluding summary judgment. Henry v. Blankenship, 275 Ga. App. 658, 621 S.E.2d 601 (2005).

Court will not decree specific performance when contract terms unclear. — A court of equity will not decree specific performance of a contract for the sale of land, where it is not clear that the terms of the contract were agreed upon and understood. Beller & Gould v. Lisenby, 248 Ga. 353, 283 S.E.2d 237 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 25, 26. 71 Am. Jur. 2d, Specific Performance, § 5.

ALR. — Right of vendor to specific performance with abatement from purchase price where he is unable to perform as to part of property, 81 A.L.R. 900.

Fraud or misrepresentation not sufficient to prevent or support other forms of relief as ground for refusing specific performance of land contract, 87 A.L.R. 1345.

Specific performance of contract or option as affected by unexecuted provision for determination of price by arbitrators or appraisers, 167 A.L.R. 727.

Improvement of property after execution of contract or option as affecting right of purchaser or optionee to specific performance, 174 A.L.R. 699.

Nature of deed which may be required of vendor who is unable to convey title for which he has contracted, 13 A.L.R.2d 1462.

Necessity and sufficiency of allegation, in a suit for specific performance of a contract for the sale of land, as to the adequacy of the consideration or as to the fairness of the contract, 100 A.L.R.2d 551.

23-2-134. Vendor's ability to comply.

The vendor seeking specific performance shall show an ability to comply substantially with his contract in every part and as to all the property. However, a vendor's want of title or other inability as to part of the property shall not be a good answer to the vendee seeking performance who is willing to accept title to part of the property, receiving compensation for the other part. If the defects in the vendor's title are trifling or comparatively small, equity shall decree at his instance, granting compensation for such defects.

History. — Orig. Code 1863, § 3123; Code 1868, § 3135; Code 1873, § 3191; Code 1882, § 3191; Civil Code 1895, § 4041; Civil Code 1910, § 4638; Code 1933, § 37-806.

Law reviews. — For article discussing the historical background of the doctrine of tender and the application in Georgia of tender requirements, and proposing reforms, see 21 Mercer L. Rev. 413 (1969).

JUDICIAL DECISIONS

Analysis

General Consideration
Substantial Compliance
Specific Performance and Damages

General Consideration

Owner not party to contract. — Court could not order specific performance of a transfer of property when the owner of the property was not a party to the contract. Rohrig Invs., LP v. Knuckle P'ship, LLLP (In re Rohrig Invs., LP), 584 B.R. 382 (Bankr. N.D. Ga. 2018).

Cited in Pearson v. Courson, 129 Ga. 656, 59 S.E. 907 (1907); Smith v. Davis, 168 Ga. 511, 148 S.E. 265 (1929); Loewus v. Eskridge & Downing, Inc., 175 Ga. 456, 165 S.E. 576 (1932); Ledbetter v. Goodroe, 179 Ga. 69, 175 S.E. 250 (1934); Lee v. Lee, 191 Ga. 728, 13 S.E.2d 774 (1941); Higdon v. Dixon, 203 Ga. 67, 45 S.E.2d 423 (1947); Lively v. Lively, 206 Ga. 606, 58 S.E.2d 168 (1950); Whiteway Neon-Ad, Inc. v. Maddox, 211 Ga. 27, 83 S.E.2d 676 (1954); Lawton v. Byck, 217 Ga. 676, 124

S.E.2d 369 (1962); West v. Downer, 218 Ga. 235, 127 S.E.2d 359 (1962); Byck v. Lawton, 218 Ga. 858, 131 S.E.2d 176 (1963).

Substantial Compliance

Party seeking specific performance of contract must show substantial compliance with his part of agreement; otherwise he is not entitled to a decree. Christopher v. Whitmire, 199 Ga. 280, 34 S.E.2d 100 (1945).

Petition seeking specific performance of a parol contract to convey land was fatally defective because of its failure to show that the petitioner had performed her part of the agreement, namely, to marry the defendant and aid him in regaining his health and carrying on his business, since by virtue of the fact that her Mexican divorce was invalid, the attempted marriage between the parties was void. Christopher v. Whitmire, 199 Ga. 280, 34 S.E.2d 100 (1945).

Mere retention of possession by vendor, after time to perform contract, will not defeat petition. Belle Greene Mining Co. v. Tuggle, 65 Ga. 652 (1880).

One should show that one has merchantable title. Lindsey v. Humbrecht, 162 F. 548 (N.D. Ga. 1908).

Knowledge of extent of one's interest was known to vendee. Mims v. Jones, 135 Ga. 541, 69 S.E. 824 (1910).

Specific Performance and Damages

Specific performance and damages are not inconsistent remedies and may be pursued in same action. Warren v. Camp, 232 Ga. 681, 208 S.E.2d 489 (1974).

Vendor has his election between specific performance and damages. Warren v. Camp, 232 Ga. 681, 208 S.E.2d 489 (1974).

Vendor has no right to force upon vendee something which he has not agreed to buy. The rule is different, however, when the application for specific performance comes from the vendee. There is a manifest reason for this difference. The vendee has a right, if he sees proper to do so, to accept less than he bargained for, and compensation for the loss of that which he does not obtain. R.C. Cropper Co. v. Middle Ga. Broadcasting Co., 212 Ga. 235, 91 S.E.2d 605 (1956).

Right of vendee to partial performance and damages. — Where a valid contract has been made to devise certain lands to another, and the person to whom the promise was made has fully performed his part of the contract, but the representative of the person making the promise is unable to perform the entire contract because his decedent did not own all of the property which he agreed to devise, and the other party to the contract is willing to accept that part of the same which the deceased actually owned, a court will require specific performance of the contract as to the part so owned and compensate the injured or disappointed party in damages for the other. Bowles v. White, 206 Ga. 433, 57 S.E.2d 547 (1950).

Where it is impossible for the vendor to convey all of the lands included in the contract of sale, a small portion having been conveyed to the highway department, and it being a contract which in good conscience ought to be performed, equity will decree performance and grant compensation for such land as cannot be conveyed, where the vendee has expressed a willingness to proceed according to the provisions of this section. Chatham Amusement Co. v. Perry, 216 Ga. 445, 117 S.E.2d 320 (1960).

Tender of purchase price. — In an action filed by a trust and its trustee against a school board alleging the breach of a real estate contract, or in the alternative, specific performance of the contract at a reduced purchase price, summary judgment in favor of the school board was reversed on the breach of contract claim; however, summary judgment on the specific performance claim was affirmed, as the trust failed to tender the full purchase price, which was a prerequisite to a specific performance demand, the trust was not excused from doing so, and a tender would not have been futile. Peaches Land Trust v. Lumpkin County Sch. Bd., 286 Ga. App. 103, 648 S.E.2d 464 (2007).

In order to entitle one to recover damages in lieu of specific performance, complainant must prove one's

Specific Performance and Damages (Cont'd)

right to the latter remedy. Warren v. Camp, 232 Ga. 681, 208 S.E.2d 489 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, Specific Performance, §§ 68, 207.

C.J.S. — 81 C.J.S., Specific Performance, § 106.

ALR. — Right of party who has once refused to perform to have specific performance of contract, 2 A.L.R. 416.

Obligation of assignee to vendor to perform contract on assignment by purchaser of contract to sell real property, 59 A.L.R. 954.

Necessity of tender of performance by vendee as condition of specific performance where vendor's title is defective, 79 A.L.R. 1240.

Right of vendor to specific performance with abatement from purchase price where he is unable to perform as to part of property, 81 A.L.R. 900.

Sale by vendor of all or substantial part of property to a third person before time fixed for performance of contract of sale as breach, or ground of rescission by vendee, or as affecting rights to specific performance, 90 A.L.R. 337.

Provision in land contract for pecuniary forfeiture or penalty by party in default as affecting the right of the other party to specific performance, 98 A.L.R. 887.

Doctrine of part performance in suits for specific performance of parol contract to convey real property, 101 A.L.R. 923.

Option to purchase at price offered to optionor by third person, 136 A.L.R. 138.

Remedy of specific performance as available to vendee's assignee, 138 A.L.R. 205.

Right of vendee to enforce specific performance where his vendor holds equitable title under executory contract or deed in escrow executed by owner of legal title, 141 A.L.R. 1432.

Purchaser's right to specific performance as to part only of property contracted for where title fails as to rest, 148 A.L.R. 563.

Specific performance of land contract where vendor will be compelled to acquire, or incur expense in clearing, title, 171 A.L.R. 1299.

Right of purchaser in making tender to deduct from agreed purchase price amount of obligations which it is the vendor's duty to satisfy, 173 A.L.R. 1309.

Specific performance: compensation or damages awarded purchaser for delay in conveyance of land, 7 A.L.R.2d 1204.

Specific performance of land contract notwithstanding failure of vendee to make required payments on time, 55 A.L.R.3d 10.

Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance, 11 A.L.R.4th 891.

23-2-135. Damages when specific performance impossible.

If, for any cause, specific performance is impossible or if the vendee declines to accept a performance in part, the court may proceed to assess damages for the breach of the contract.

History. — Orig. Code 1863, § 3124; Code 1868, § 3136; Code 1873, § 3192; Code 1882, § 3192; Civil Code 1895, § 4042; Civil Code 1910, § 4639; Code 1933, § 37-807.

JUDICIAL DECISIONS

Analysis

General Consideration
Damages Generally

General Consideration

Award of specific performance does not, as a matter of law, bar recovering attorney fees or punitive damages. Clayton v. Deverell, 257 Ga. 653, 362 S.E.2d 364 (1987).

Cited in Woodall v. Williams, 176 Ga. 343, 167 S.E. 886 (1933); Deich v. Reeves, 203 Ga. 596, 48 S.E.2d 373 (1948); Bowles v. White, 206 Ga. 433, 57 S.E.2d 547 (1950); Douglas v. Langford, 206 Ga. 864, 59 S.E.2d 386 (1950); Harris v. Underwood, 208 Ga. 247, 66 S.E.2d 332 (1951); Holsomback v. Caldwell, 218 Ga. 393, 128 S.E.2d 47 (1962); Horner v. Savannah Valley Enters., Inc., 234 Ga. 371, 216 S.E.2d 113 (1975); Kirkley v. Jones, 250 Ga. App. 113, 550 S.E.2d 686 (2001).

Damages Generally

Specific performance and damages may be pursued in same action. — If, on the trial of an action for specific performance, it should be developed that without fault of the plaintiff but on account of the defendant himself a specific performance of the contract is impossible, the court may proceed to assess damages for a breach of the contract. An amendment praying for such damages would not in contemplation of law make a new cause of action, for this section expressly authorizes the granting of such relief, even when not contemplated by the original suit. Armor v. Stubbs, 150 Ga. 520, 104 S.E. 500 (1920); Lewis v. Warren, 51 Ga. App. 135, 179 S.E. 918 (1935).

In order to entitle one to recover damages in lieu of specific performance, complainant must prove his right to the latter remedy. Prater v. Sears, 77 Ga. 28 (1886); Loewus v. Eskridge & Downing, Inc., 175 Ga. 456, 165 S.E. 576 (1932).

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, Specific Performance, § 69 et seq.

C.J.S. — 81 C.J.S., Specific Performance, § 106.

ALR. — Dismissal of suit as affecting election of remedies as between damages and specific performance, 26 A.L.R. 111.

Doctrine of part performance in suits for specific performance of parol contract to convey real property, 101 A.L.R. 923.

Right of one seeking specific performance to recover as damages an amount measured by depreciation in value of property itself, or in its market price or value, subsequent to defendant's default, 105 A.L.R. 1421.

Specific performance: compensation or damages awarded purchaser for delay in conveyance of land, 7 A.L.R.2d 1204.

Awarding damages for delay, in addition to specific performance, of contract for sale of corporate stock, 28 A.L.R.3d 1401.

Decree allowing or denying specific performance of contract as precluding, as a matter of res judicata, subsequent action for money damages for breach, 38 A.L.R.3d 323.

Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance, 11 A.L.R.4th 891.

23-2-136. Specific personalty; damages or delivery.

Any good reason in equity and good conscience why the complainant should have the possession of specific personalty to which he has title shall sustain an action for specific performance or delivery and, unless

rebutted by other equitable reasons, shall justify a decree. The jury in such cases may decree either damages or specific delivery.

History. — Orig. Code 1863, § 3120; Code 1868, § 3132; Code 1873, § 3188; Code 1882, § 3188; Civil Code 1895, § 4038; Civil Code 1910, § 4635; Code 1933, § 37-803.

JUDICIAL DECISIONS

As a general rule, remedy of decree for specific performance relates only to real estate, and is not applicable to personalty, so the cardinal rules which apply to the remedy of specific performance are applied with greater strictness where personalty is concerned than where realty is involved. Gabrell v. Byers, 178 Ga. 16, 172 S.E. 227 (1933).

There are exceptions to this rule, and insolvency alone may supply basis for an exception. Reid v. McRae, 190 Ga. 323, 9 S.E.2d 176 (1940).

Where in a settlement between a landlord and a tenant the landlord credited the tenant with a sum for which the tenant agreed that he would turn over to the landlord a check for parity on cotton which he was to receive from the federal government, and where on receipt of the check he failed and refused to endorse and deliver it to the landlord, the tenant being insolvent, the landlord could maintain an action for specific performance to require the tenant to endorse and deliver the check in accordance with the agreement, the petition stating a cause of action for specific performance, injunction, and receivership. Reid v. McRae, 190 Ga. 323, 9 S.E.2d 176 (1940).

Requires good reason for exception. — In order to sustain a petition for the specific performance of a contract relating to personal property, it is necessary to allege some good reason in equity and good conscience to take the case out of the general rule. Gabrell v. Byers, 178 Ga. 16, 172 S.E. 227 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 17A Am. Jur. 2d, Contracts, § 11 et seq.

ALR. — A provision in land contract for pecuniary forfeiture or penalty by a party is default as affecting the right of the other party to specific performance, 32 A.L.R. 584; 98 A.L.R. 877.

Specific performance of contract for sale of corporate stock, 130 A.L.R. 920.

Specific performance, or injunction against breach, of contract for sale of tangible personal property, 152 A.L.R. 4.

CHAPTER 3

EQUITABLE REMEDIES AND PROCEEDINGS GENERALLY

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Article 3

Quia Timet

Part 1

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23-3-123. Statute of limitations; service of subpoena; limitation on disclosures; intervention; preponderance of the evidence standard; effect of criminal conviction on civil actions.
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ARTICLE 1

GENERAL PROVISIONS

JUDICIAL DECISIONS

Purpose of this article is to vest in the superior court authority under the Uniform Procedure Act (now codified in this article and §§ 23-4-2 and 23-4-3) to settle in one suit a controversy between parties. Clay v. Smith, 207 Ga. 610, 63 S.E.2d 602 (1951).

23-3-1. Legal and equitable rights given effect; legal and equitable remedies applied.

The superior courts, on the trial of any civil case, shall give effect to all the rights of the parties, legal, equitable, or both, and apply remedies or relief, legal, equitable, or both, in favor of either party, as the nature of the case may allow or require.

History. — Ga. L. 1887, p. 64, § 1; Civil Code 1895, § 4833; Civil Code 1910, § 5406; Code 1933, § 37-901.

Law reviews. — For article discussing third party beneficiary contracts, see 4 Ga. B.J. 19 (1941).

For comment on McMillian v. Spencer, 162 Ga. 659, 134 S.E. 921 (1926), see 1 Ga. L. Rev. 52 (1927). For comment on Waters v. Waters, 217 Ga. 557, 123 S.E.2d 765 (1962), see 25 Ga. B.J. 419 (1963).

JUDICIAL DECISIONS

Adequate remedy at law not ground for dismissal of petition with legal cause of action when filed in superior court. — A petition which sets forth a legal cause of action, though using terms appropriate to an equitable proceeding, insofar as the same does not seek any extraordinary relief, is not demurrable (now subject to motion to dismiss) on the ground that the plaintiff has an adequate remedy by bringing an action at law. Arteaga v. Arteaga, 169 Ga. 595, 151 S.E. 5 (1929); Woodall v. Williams, 176 Ga. 343, 167 S.E. 886 (1933); Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941); Pardue Medicine Co. v. Pardue, 194 Ga. 516, 22 S.E.2d 143 (1942); Cohen v. Cohen, 200 Ga. 33, 35 S.E.2d 908 (1945); Parnell v. Wooten, 202 Ga. 443, 43 S.E.2d 673 (1947); Echols v. Thompson, 210 Ga. 37, 77 S.E.2d 521 (1953).

This section changed the rule that a petition praying for only ordinary equitable relief is demurrable (now subject to motion to dismiss) on the ground that the plaintiff has a complete and adequate remedy at law. Teasley v. Bradley, 110 Ga. 497, 35 S.E. 782, 78 Am. St. R. 113 (1900); Booth & Co. v. Mohr & Sons, 122 Ga. 333, 50 S.E. 173 (1905); Georgia Peruvian Ochre Co. v. Cherokee Ochre Co., 152 Ga. 150, 108 S.E. 609 (1921); Logue &

Co. v. Gardner, 152 Ga. 356, 110 S.E. 25 (1921); Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937).

Petition not demurrable (now subject to motion to dismiss) on certain grounds. — Since the passage of this section a petition which sets forth a legal cause of action, though using terms appropriate to an equitable proceeding, is not demurrable (now subject to motion to dismiss) on the grounds: (a) that it sets forth no cause of action; (b) that there is no equity in the petition; and (c) that the plaintiff has an adequate remedy at law. Smith v. Hancock, 163 Ga. 222, 136 S.E. 52 (1926).

Legal and equitable cases may be joined in the same action. Concrete Coring Contractors v. Mechanical Contractors & Eng'rs, 220 Ga. 714, 141 S.E.2d 439 (1965).

Misjoinder of claims not ground for objection. — The joining against the same defendants of legal and equitable rights and remedies which are connected with or dependent upon each other does not render a petition subject to the objection of duplicity or misjoinder of claims. Center v. Arp, 198 Ga. 574, 32 S.E.2d 308 (1944).

Despite statutory remedies at law, a superior court could settle the whole controversy to avoid a multiplicity of actions. Haney v. Sheppard, 207 Ga. 158, 60 S.E.2d 453 (1950).

Purpose of article. — This and kindred legislation (this article and O.C.G.A. §§ 23-4-2 and 23-4-3) were intended to afford a party the opportunity to have all the party's rights in regard to the subject matter tried in one action in the superior court, without the necessity of having two distinct actions to settle the party's legal rights and the party's equitable rights against the adverse party. Sometimes equitable pleadings by one of the parties may require the making of additional parties, in order that full relief may be granted. Delaney v. Sheehan, 138 Ga. 510, 75 S.E. 632 (1912); Penn Mut. Life Ins. Co. v. Taggart, 38 Ga. App. 509, 144 S.E. 400 (1928); Cummings v. Robinson, 194 Ga. 336, 21 S.E.2d 627 (1942); Moore v. Robinson, 206 Ga. 27, 55 S.E.2d 711 (1949); Earney v. Owen, 213 Ga. 412, 99 S.E.2d 201 (1957).

Plaintiff shall not be harassed by other actions growing out of the same controversy, although they are based upon independent claims, legal or equitable, which the defendant might have against the plaintiff in reference to the cause of the controversy. McCall v. Fry, 120 Ga. 661, 48 S.E. 200 (1904).

Section construed with § 23-3-2. — Referring to former Civil Code 1910, §§ 5406 and 5407 (see O.C.G.A. §§ 23-3-1 and 23-3-2), the Georgia Supreme Court said: "these Acts have been construed with the utmost liberality, to the end that all the remedies and relief to which the respective parties might be entitled should be applied and accorded in one action." Douglas v. Jenkins, 146 Ga. 341, 91 S.E. 49, 1918C Ann. Cas. 322 (1916); Durden v. Youmans, 37 Ga. App. 182, 139 S.E. 91 (1927); Star Laundry Co. v. May Dry Cleaning Co., 176 Ga. 34, 166 S.E. 655 (1932); Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941).

Actions arising out of general plan between parties must be asserted in one action. — When a trover action was filed in a superior court, and thereafter the defendant filed, in a different superior court, an equitable action, to enjoin the trover action, and for other relief, so far as the petition alleged any defense or cause of complaint against any of the parties named as defendants, the same could have been asserted as effectually by way of defense or counterclaim in the trover proceeding, and the allegations did not show any necessity for an independent equitable action. Hamilton v. First Nat'l Bank, 180 Ga. 820, 180 S.E. 840 (1935).

When proceeding to enjoin an action against plaintiff to cancel a sale of plaintiff's property by defendant as well as the note on which the defendant is suing arose out of same general plan between the parties to develop and operate a recreational place, defendant in action on note by answer and counterclaim must assert all his claims for legal and equitable relief arising out of the general plan between the parties, and could not bring an independent action to enjoin action on the note and litigate those matters. Clay v. Smith, 207 Ga. 610, 63 S.E.2d 602 (1951).

Effect of § 9-5-6 on proceedings involving equity. — Although under equity

a creditor may in one action proceed for judgment on his debt and to set aside a fraudulent conveyance made by his debtor, still, under former Code 1933, § 55-106 (see O.C.G.A. § 9-5-6), creditors who have not reduced their demands to judgment, and who have no lien otherwise, cannot, as a general rule, enjoin their debtors from selling or disposing of their property. Lawrence v. Lawrence, 196 Ga. 204, 26 S.E.2d 283 (1943).

All distinction between legal and equitable remedies and relief and the modes of administering them are not abolished. Except in providing that both kinds shall be applied for by one form of petition, and may be administered by the court in one and the same proceeding, it leaves the mode of trial as to each unchanged. Mackenzie v. Flannery & Co., 90 Ga. 590, 16 S.E. 710 (1892).

This section does not give to the superior courts an unlimited power to "give effect to all the rights of the parties, legal or equitable, or both," but the exercise of the power is restricted to instances when the nature of the case may allow or require it. Rogers v. Rogers, 183 Ga. 131, 187 S.E. 633 (1936).

Collateral matters not within scope of original proceedings not encompassable by equitable jurisdiction. — While a court of equitable jurisdiction, when it has all the necessary parties before it and has once taken jurisdiction of a particular subject matter, will ordinarily proceed to do complete justice, and finally administer the rights of each of the respective parties, it will not extend its jurisdiction in such manner as to draw to itself collateral matters not appropriately comprehended within the scope of the original proceedings under which, in the first instance, it assumed jurisdiction. Rogers v. Rogers, 183 Ga. 131, 187 S.E. 633 (1936).

Lack of jurisdiction of nonresident party prevents superior court from taking jurisdiction. — A separate and distinct equitable cause of action against the resident defendant will not give the superior court of the county of his residence jurisdiction of a nonresident defendant against whom the plaintiff has another, independent, separate and distinct equitable cause of action; this is especially true where the plaintiff has an adequate remedy at law on his cause of action against the nonresident defendant. Shaheen v. Dunaway Drug Stores, Inc., 246 Ga. 790, 273 S.E.2d 158 (1980).

Application of legal and equitable principles. — When both legal and equitable principles are united in one petition, the court applies legal principles to legal rights and equitable principles to equitable rights. Thomas v. Walker, 115 Ga. 11, 41 S.E. 269 (1902); Bentley v. Crummey & Hamilton, 119 Ga. 911, 47 S.E. 209 (1904).

Difference is one of substance, and not of form, and this was the practice of the courts in this state even prior to the passage of the Uniform Procedure Act of 1887 (this article and O.C.G.A. §§ 23-4-2 and 23-4-3). Baker & Hall v. Gladden, 72 Ga. 469 (1884); Crawford v. Williams, 76 Ga. 792 (1886); Berrie v. Smith, 97 Ga. 782, 25 S.E. 757 (1896).

Showing prerequisites to maintenance of petition. — Since the passage of the Uniform Procedure Act of 1887 (now this article, O.C.G.A. §§ 23-4-2 and 23-4-3), it is not necessary, in order to maintain the petition, that the plaintiff should make it appear that it has no remedy at law. DeLacy v. Hurst, Purnell & Co., 83 Ga. 223, 9 S.E. 1052 (1889); Georgia Iron & Coal Co. v. Etowah Iron Co., 104 Ga. 395, 30 S.E. 878 (1898); Ray v. Home & Foreign Inv. & Agency Co., 106 Ga. 492, 32 S.E. 603 (1899); Teasley v. Bradley, 110 Ga. 497, 35 S.E. 782, 78 Am. St. R. 113 (1900); Brooks v. Stroud, 111 Ga. 875, 36 S.E. 960 (1900); Evans v. Piedmont Nat'l Bldg. & Loan Ass'n, 117 Ga. 940, 44 S.E. 2 (1903).

Nature of the relief prayed for is immaterial. Troup v. Martin, 158 Ga. 178, 122 S.E. 611 (1924).

Superior court has no more power or jurisdiction by the combination of courts of law and equity, than those two courts had before the Uniform Procedure Act of 1887 (now this article, O.C.G.A. §§ 23-4-2 and 23-4-3). Broomhead v. Grant, 83 Ga. 451, 10 S.E. 116 (1889).

Law does not purport to create rights otherwise unauthorized or prohibited. Penn Mut. Life Ins. Co. v.

Taggart, 38 Ga. App. 509, 144 S.E. 400 (1928).

Grounds for extraordinary relief unchanged. — Since the Uniform Procedure Act of 1887 (now this article, §§ 23-4-2 and 23-4-3), permitting parties to obtain all necessary and proper legal and equitable relief in the same case, did not create any new ground for extraordinary remedies, the settled general rule stills obtains that the remedy of injunction does not lie in favor of one who has a complete and adequate remedy at law, such as an ordinary attachment. Virginia-Carolina Chem. Co. v. Provident Sav. Life Assurance Soc'y, 126 Ga. 50, 54 S.E. 929 (1906); Campbell v. Deal, 185 Ga. 474, 195 S.E. 432 (1938); Lawrence v. Lawrence, 196 Ga. 204, 26 S.E.2d 283 (1943).

Aid of the superior court may be invoked to protect an equitable interest necessary to an action to recover damages. Lowery Lock Co. v. Wright, 154 Ga. 867, 115 S.E. 801 (1923).

Right of equitable set-off may be granted in the superior courts, but not city courts which cannot grant affirmative equitable relief. Hecht v. Snook & Austin Furn. Co., 114 Ga. 921, 41 S.E. 74 (1902).

Enjoining nuisances. — A court of equitable jurisdiction, having jurisdiction to enforce the common right of all of the plaintiffs to enjoin an alleged nuisance, will seek to do complete justice by granting them all appropriate relief, whether legal or equitable. Knox v. Reese, 149 Ga. 379, 100 S.E. 371 (1919).

Enjoining counterclaim proper. — The plaintiff, by bringing the action for divorce in the Superior Court of Fulton County, had submitted himself to the jurisdiction of the court even though he did not live in the state. The relief sought in the counterclaim that action be enjoined because plaintiff was not a citizen and was not of the state was pertinent and could be rightfully urged against the plaintiff and it was not necessary that he be served with the counterclaim. Callaway v. Jones & Quattlebum, 19 Ga. 277 (1856); Ray v. Home & Foreign Inv. & Agency Co., 106 Ga. 492, 32 S.E. 603 (1849); Markham v. Huff, 72 Ga. 874 (1884); Caswell v. Bunch, 77 Ga. 504 (1886); Moore, Marsh & Co. v. Medlock, 101 Ga. 94, 28 S.E. 836 (1897); Home Mixture Guano Co. v. Woolfolk, 148 Ga. 567, 97 S.E. 637 (1918); Shorter v. Shorter, 150 Ga. 109, 102 S.E. 863 (1920).

Former Code 1933, § 36-1104 et seq. (O.C.G.A. § 22-2-130 et seq.) makes adequate provision for anyone claiming an interest in the subject property to assert equitable as well as legal rights to the property in the condemnation proceeding itself. Mitchell v. State Hwy. Dep't, 216 Ga. 517, 118 S.E.2d 88 (1961).

Action for land may be included in a petition for equitable relief. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591 (1941).

Partition, accounting, settlement of title, in same suit. — A tenant in common may have certain land so held partitioned and an accounting between the tenants in common under § 44-6-160. The court has power to determine the various matters in dispute between the parties, including their respective title to the land, to have an accounting for rents and profits, award partition, etc. Griffin v. Griffin, 153 Ga. 547, 113 S.E. 161 (1922).

Petition for accounting maintainable even though proof for injunctive relief not shown. — A petition for an injunction and an accounting, alleging that the defendant had excluded the petitioner from the management of his business and had acquired and failed to account for considerable moneys derived from its profits, while failing to allege any fraud or insolvency of the defendant, and thus not showing any ground for injunctive relief, sufficiently stated a cause of action for an accounting. Cohen v. Cohen, 200 Ga. 33, 35 S.E.2d 908 (1945).

Also, where a plaintiff seeks by way of accounting to recover an amount alleged to be due him upon a contract, and to that extent may have prima facie an adequate remedy at law, and it also appears from the allegations of the petition that his action for damages is not an adequate remedy, or that his legal remedy will be nugatory without the cooperation of equity, the aid of a court of equity may be invoked. Alexis, Inc. v. Werbell, 209 Ga. 665, 75 S.E.2d 168 (1953).

While the general rule is that, for a plaintiff to maintain an equitable petition to remove a cloud upon his title, he must allege and prove possession in himself, nevertheless since it is competent for the plaintiff to obtain both legal and equitable relief in the same action where a plaintiff seeks to have the title to land declared to be in herself, in addition to cancellation and injunction, the fact that the plaintiff fails to show possession in herself does not prevent her from having the title to the property adjudged to be in her, although such fact would defeat the cancellation sought. Moody v. McHan, 184 Ga. 740, 193 S.E. 240 (1937).

Reformation of deed, recovery of possession, and damages maintainable in one action. — The owner of land who has to have reformation of one or more deeds in his title chain before he can recover, by ejectment or other legal remedy, the possession of land held adversely to him may bring an action in superior court to reform the deed and in the same action pray for recovery of the possession of the land and for damages for its detention. Mims v. Lifsey, 192 Ga. 366, 15 S.E.2d 440 (1941).

Heirs' suit against administrator. — Heirs at law may sue an administrator and his sureties upon his bond, and may, by way of amendment to the action, pray for an accounting and settlement with the administrator. DeLacy v. Hurst, Purnell & Co., 83 Ga. 223, 9 S.E. 1052 (1889); Williams v. Lancaster, 113 Ga. 1020, 39 S.E. 471 (1901).

A demurrer (now motion to dismiss) to a prayer for injunction against a levy on property should be sustained where the invalidity of the levy could be set up in a claim case. Atlanta Mut. Ass'n v. Swift & Co., 153 Ga. 722, 113 S.E. 8 (1922).

Foreclosure of mortgages permissible in equity, can be accomplished in a court of law. Block v. Allen, 99 Ga. 417, 27 S.E. 733 (1896).

Manner of setting up equitable defenses at law. — Littleton v. Spell, 77 Ga. 227, 2 S.E. 935 (1886).

Different judgments against different parties. — Where an equitable defense is set up by the defendant in an action of ejectment and prevails against the right of any one or more of the plaintiffs to recover, the common-law rule as to actions of ejectment, that all the plaintiffs shall recover or none, does not apply. Rumph v. Truelove, 66 Ga. 480 (1881); Milner v. Vandivere, 86 Ga. 540, 12 S.E. 879 (1891).

An amendment in a claim case may bring in new parties. The fraudulent nature of the claimant's deed may be set up. Ford v. Holloway, 112 Ga. 851, 38 S.E. 373 (1901).

Court may allow recovery of a debt in a petition to cancel a deed. Lanier v. Elder, 154 Ga. 707, 115 S.E. 81 (1922); Harper v. Atlanta Milling Co., 203 Ga. 608, 48 S.E.2d 89 (1948).

Where proceeding to enjoin an action against plaintiff to cancel a sale of plaintiff's property by defendant as well as the note on which the defendant is suing arose out of same general plan between the parties to develop and operate a recreational place, defendant in action on note by answer and counterclaim must assert all his claims for legal and equitable relief arising out of the general plan between the parties, and could not bring an independent action to enjoin action on the note and litigate those matters. Clay v. Smith, 207 Ga. 610, 63 S.E.2d 602 (1951).

An ancillary petition may be filed after as well as before a decree to enable a superior court to effectuate its own decree by ordering one put in possession of property where entitled thereto under its original decree, in order to avoid the further litigation of questions once settled between the same parties. Voyles v. Federal Land Bank, 182 Ga. 569, 186 S.E. 405 (1936).

Fraudulent release. — An amendment setting up that a release pleaded in defense to an action for personal injuries was fraudulent, and should be set aside is permissible. Western & Atl. R.R. v. Atkins, 141 Ga. 743, 82 S.E. 139 (1914).

An amendment to a petition to enforce promissory notes may set up that defendant was adjudged a bankrupt and pray for special judgment against exempted property. Wright v. Horne, 123 Ga. 86, 51 S.E. 30 (1905).

A defendant in ejectment may set up an equitable defense to an action

at law. Clewis v. Hartman, 71 Ga. 810 (1883); Woffard v. Wyly, 72 Ga. 863 (1884).

Action at law against trust estates. — A petition at law, with proper allegation, may suffice to enforce any kind of a just demand against a trust estate. Miller v. Smythe, 92 Ga. 154, 18 S.E. 46 (1893).

Affirmative relief. — The defendant may obtain affirmative relief by an answer in an action for specific performance, cancellation, injunction and damages to land. Becker v. Donalson, 133 Ga. 864, 67 S.E. 92 (1910).

When dismissal of answer not authorized. — By striking from a petition that portion making a defendant who has prayed for affirmative relief, a party thereto, will not authorize a dismissal of the answer. Troup v. Martin, 158 Ga. 178, 122 S.E. 611 (1924).

Effect of failure to make equitable defense at law. — A party who has an equitable defense must make it or he will be concluded by the judgment. Field v. Price, 52 Ga. 469 (1874); Thomason v. Fannin, 54 Ga. 361 (1975); Turner v. Rives, 75 Ga. 606 (1885); McCall v. Fry, 120 Ga. 661, 48 S.E. 200 (1904).

Defendant at law may, by the defendant's plea, set up any equitable defense the defendant has to the action at law, the defendant is not obliged to do so. Elder v. Allison, 45 Ga. 13 (1872).

There is authority suggesting that the defendant had better set up all defenses the defendant has or stand barred. Thomason v. Fannin, 54 Ga. 361 (1875).

Upon an application for an interlocutory injunction, the superior court is without jurisdiction to enter a decree finally fixing the amount of money to be paid by either of the parties to the other. Leary v. First Nat'l Bank, 177 Ga. 179, 170 S.E. 84 (1933).

Counter-claim not affected by dismissal of original claim. — Dismissal of an action for want of prosecution, where the defendant has filed a cross-claim (now counter-claim) seeking equitable relief, does not dismiss the issues raised by the cross-claim; this is true where the relief sought affects codefendants in the proceeding. Winn v. Armour & Co., 184 Ga. 769, 193 S.E. 447 (1937); Byrd v. Equitable Life Assurance Soc'y, 185 Ga. 628, 196 S.E. 63 (1938).

Cited in Cox v. Cox, 48 Ga. 619 (1873); Manheim v. Claflin & Co., 81 Ga. 129, 7 S.E. 284 (1889); DeLacy v. Hurst, Purnell & Co., 83 Ga. 223, 9 S.E. 1052 (1889); Regenstein v. Tyler & Co., 84 Ga. 277, 10 S.E. 719 (1890); Stapler v. Hardeman, 91 Ga. 127, 16 S.E. 657 (1893); Georgia Iron & Coal Co. v. Etowah Iron Co., 104 Ga. 395, 30 S.E. 878 (1898); Brumby v. Harris, 107 Ga. 257, 33 S.E. 49 (1899); Ford v. Holloway, 112 Ga. 851, 38 S.E. 373 (1901); Hecht v. Snook & Austin Furn. Co., 114 Ga. 921, 41 S.E. 74 (1902); Perkins v. Castleberry, 119 Ga. 702, 46 S.E. 825 (1904); Carstarphen Whse. Co. v. Fried, 124 Ga. 544, 52 S.E. 598 (1905); Douglas v. Jenkins, 146 Ga. 341, 91 S.E. 49, 1918C Ann. Cas. 322 (1916); Real Estate Bank & Trust Co. v. Baldwin Locomotive Works, 148 Ga. 821, 98 S.E. 486 (1919); Beacham v. Nobles, 153 Ga. 718, 113 S.E. 6 (1922); Hopkins v. Vance, 153 Ga. 754, 113 S.E. 157 (1922); McMillian v. Spencer, 162 Ga. 569, 134 S.E. 921 (1926); Ocilla Grocery Co. v. Wilcox, Ives & Co., 37 Ga. App. 718, 141 S.E. 822 (1928); White v. First Nat'l Bank, 174 Ga. 281, 162 S.E. 701 (1932); Burgess v. Ohio Nat'l Life Ins. Co., 177 Ga. 48, 169 S.E. 364 (1933); Reynolds v. Ingraham, 179 Ga. 398, 175 S.E. 918 (1934); Biddle v. Papa, 180 Ga. 468, 179 S.E. 357 (1935); Tanner v. Wilson, 183 Ga. App. 53, 187 S.E. 625 (1936); Harrell v. Parker, 186 Ga. 760, 198 S.E. 776 (1938); Hicks v. Atlanta Trust Co., 187 Ga. 314, 200 S.E. 301 (1938); Mize v. Harber, 189 Ga. 737, 8 S.E.2d 1 (1940); Lynch v. Harris County, 191 Ga. 132, 12 S.E.2d 293 (1940); Sawyer Coal & Ice Co. v. Kinnett-Odom Co., 192 Ga. 166, 14 S.E.2d 879 (1941); Lockwood v. Daniel, 193 Ga. 122, 17 S.E.2d 542 (1941); Beavers v. Mabry, 195 Ga. 169, 23 S.E.2d 672 (1942); Borum v. Deese, 196 Ga. 292, 26 S.E.2d 538 (1943); Clark v. Bandy, 196 Ga. 546, 27 S.E.2d 17 (1943); Alford v. Alford, 198 Ga. 424, 31 S.E.2d 785 (1944); Beavers v. Williams, 199 Ga. 114, 33 S.E.2d 343 (1945); Avary v. Avary, 202 Ga. 22, 41 S.E.2d 314 (1947); Hamilton v. Hamilton, 80 Ga. App. 750, 57 S.E.2d 301 (1950); Georgia Power Co. v. Mayor of Athens, 206 Ga. 513, 57 S.E.2d 573 (1950); Cashin v. Markwalter, 208 Ga.

444, 67 S.E.2d 226 (1951); Rockefeller v. First Nat'l Bank, 213 Ga. 493, 100 S.E.2d 279 (1957); Waters v. Waters, 217 Ga. 557, 123 S.E.2d 765 (1962); Ogletree v. Cathrall, 110 Ga. App. 100, 137 S.E.2d 799 (1964); Brown v. Granite Holding Corp., 221 Ga. 560, 146 S.E.2d 289 (1965); Jonesboro Area Athletic Ass'n v. Dickson, 227 Ga. 513, 181 S.E.2d 852 (1971); Kiser v. Georgia Power Co., 126 Ga. App. 551, 191 S.E.2d 311 (1972); Hudson v. Hudson, 258 Ga. 692, 373 S.E.2d 372 (1988).

RESEARCH REFERENCES

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C.J.S. — 30 C.J.S., Equity, § 97 et seq.

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A provision in land contract for pecuniary forfeiture or penalty by a party is default as affecting the right of the other party to specific performance, 32 A.L.R. 584; 98 A.L.R. 877.

Power of equity to require acceptance of damages in lieu of injunctive relief asked, 105 A.L.R. 1381.

Power of court to determine de jure title to office as incident of suit to protect possession of officer against claimant whose title is disputed, 114 A.L.R. 1147.

Power of equity to decree that party perform obligations of contract within fixed time upon pain of forfeiture, 114 A.L.R. 1389.

Jurisdiction of equity to protect personal rights; modern view, 175 A.L.R. 438.

Applications of rule permitting courts to exercise jurisdiction over equity actions against foreign personal representatives where there are assets within forum, 53 A.L.R.2d 323.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 A.L.R.2d 1180.

Injunction against exercise of power of eminent domain, 93 A.L.R.2d 465.

Punitive damages: power of equity court to award, 58 A.L.R.4th 844.

23-3-2. How equitable relief claimed.

Any person may, in any civil action, claim equitable relief by appropriate and sufficient pleadings and obtain the equitable relief proper in the case.

History. — Ga. L. 1884-85, p. 36, § 1; Civil Code 1895, § 4834; Civil Code 1910, § 5407; Code 1933, § 37-902.

Law reviews. — For comment on McMillian v. Spencer, 162 Ga. 659, 134 S.E. 921 (1926), see 1 Ga. L. Rev. 52 (1927).

JUDICIAL DECISIONS

All legal and equitable defenses must be set up in one action. — Former Civil Code 1910, § 5406 et seq.(see O.C.G.A. § 23-3-1 et seq.) and former Civil Code 1910, §§ 5410 and 5412 (see O.C.G.A. §§ 23-4-2 and 23-4-3) have been construed by the Supreme Court of Georgia with the utmost liberality, and the manifest intention of the General Assembly that all the remedies and relief to which the respective parties in any civil cause might be entitled should be applied and accorded in one action, has been given full effect. Star Laundry Co. v. May Dry Cleaning Co., 176 Ga. 34, 166 S.E. 655 (1932); Johnson v. Fulton County, 216 Ga. 498, 117 S.E.2d 155 (1960).

Action arising out of general plan between parties must be asserted in one action. — When proceeding to enjoin an action against plaintiff to cancel a sale of plaintiff's property by defendant as well as the note on which the defendant is suing arose out of same general plan between the parties to develop and operate a recreational place, defendant in action on

note by answer and counterclaim must assert all the defendant's claims for legal and equitable relief arising out of the general plan between the parties, and could not bring an independent action to enjoin action on the note and litigate those matters. Clay v. Smith, 207 Ga. 610, 63 S.E.2d 602 (1951).

An ancillary petition may be filed after as well as before a decree to enable a superior court to effectuate its own decree by ordering one put in possession of property where entitled thereto under its original decree, in order to avoid the further litigation of questions once settled between the same parties. Voyles v. Federal Land Bank, 182 Ga. 569, 186 S.E. 405 (1936).

After an ancillary petition seeking possession of property is filed, the court may cause other parties to be made, where they are asserting some rights affecting the property and while a claimant in possession may not be subject to summary dispossession by the sheriff under the warrant sued out, the superior court has authority, under its broad powers, to make the claimant a party in order to settle the rights of all parties in one action, without remitting the petitioner in the ancillary proceeding to a common-law action of ejectment. Voyles v. Federal Land Bank, 182 Ga. 569, 186 S.E. 405 (1936).

Injunction pending trover action. — An injunction to restrain interference with defendant's possession pending action in trover might have been obtained by a plea to the trover action. Mallory Bros. & Co. v. Cowart, 90 Ga. 600, 16 S.E. 658 (1892).

Obtaining relief in claim action. — In a claim case, in the absence of a suitable amendment of proper equitable pleas, the plaintiff in fi. fa. cannot introduce evidence which tends to show merely that in good conscience and equity the claimant is liable for a debt. Gormerly v. Chapman, 51 Ga. 421 (1874); Hamberger v. Easter, 57 Ga. 71 (1876); Southern Mining Co. v. Brown, 107 Ga. 264, 33 S.E. 73 (1899); Ford v. Holloway, 112 Ga. 851, 38 S.E. 373 (1901); Liberty Lumber Co. v. Enecks, 23 Ga. App. 311, 98 S.E. 97 (1919).

Amendment seeking equitable relief in common law action allowed. Moon v. First Nat'l Bank, 163 Ga. 489, 136 S.E. 433 (1927).

Cited in Douglas v. Jenkins, 146 Ga. 341, 91 S.E. 49, 1918C Ann. Cas. 322 (1916); McMillian v. Spencer, 162 Ga. 659, 134 S.E. 921 (1926); Burgess v. Ohio Nat'l Life Ins. Co., 177 Ga. 48, 169 S.E. 364 (1933); Leary v. First Nat'l Bank, 177 Ga. 179, 170 S.E. 84 (1933); Reynolds v. Ingraham, 179 Ga. 398, 175 S.E. 918 (1934); Biddle v. Papa, 180 Ga. 468, 179 S.E. 357 (1935); Hicks v. Atlanta Trust Co., 187 Ga. 314, 200 S.E. 301 (1938); Davis v. Wright, 194 Ga. 1, 21 S.E.2d 88 (1942); Clements v. Hollingsworth, 202 Ga. 684, 44 S.E.2d 381 (1947); Seckinger v. Citizens & S. Nat'l Bank, 213 Ga. 586, 100 S.E.2d 587 (1957); A & D Barrel & Drum Co. v. Fuqua, 132 Ga. App. 827, 132 S.E.2d 272 (1974).

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ALR. — Joinder of parties or causes of action in suits under the Federal Employers' Liability Act, 13 A.L.R. 159.

Right under general prayer to relief inconsistent with prayer for specific relief, 30 A.L.R. 1175.

"Rightness" of judgment as open for consideration in suit in equity to complete or effectuate it, 139 A.L.R. 1507.

Measure and items of recovery for improvements mistakenly placed or made on land of another, 24 A.L.R.2d 11.

23-3-3. Ancillary extraordinary remedies.

A person who asserts a claim for equitable relief may at any time, by proper pleading and proof, also apply for and obtain any of the

extraordinary remedies available from the court in its exercise of equitable powers.

History. — Ga. L. 1884-85, p. 36, § 1; Civil Code 1895, § 4836; Civil Code 1910, § 5409; Code 1933, § 37-904.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

JUDICIAL DECISIONS

Law does not permit the courts to grant relief under prayers for extraordinary remedies, when there is adequate remedy at law. Teasley v. Bradley, 110 Ga. 497, 35 S.E. 782, 78 Am. St. R. 113 (1900). See also, Kilpatrick v. Coates, 154 Ga. 643, 115 S.E. 103 (1922).

History and purpose. — Former Code 1933, §§ 37-904, 37-905, 37-907, and other provisions were codified from the Uniform Procedure Acts of 1884 and 1887, vest authority in the superior courts of this state to settle in one proceeding all issues growing out of a justiciable controversy between the same parties; and, under these rules of procedure, it is clear that the plaintiffs can in a pending processioning proceeding, by proper pleading and proof, obtain all of the relief sought in an independent action. Earney v. Owen, 213 Ga. 412, 99 S.E.2d 201 (1957).

Cited in Liberty Lumber Co. v. Enecks, 23 Ga. App. 311, 98 S.E. 97 (1919); Kilpatrick v. Coates, 154 Ga. 643, 115 S.E. 103 (1922); Biddle v. Papa, 180 Ga. 468, 179 S.E. 357 (1935); Hoxie v. Americus Auto. Co., 73 Ga. App. 686, 37 S.E.2d 808 (1946); Georgia Power Co. v. Mayor of Athens, 206 Ga. 513, 57 S.E.2d 573 (1950); Seckinger v. Citizens & S. Nat'l Bank, 213 Ga. 586, 100 S.E.2d 587 (1957); Ogletree v. Cathrall, 110 Ga. App. 100, 137 S.E.2d 799 (1964).

RESEARCH REFERENCES

ALR. — Joinder of parties or causes of action in suits under the Federal Employers' Liability Act, 13 A.L.R. 159.

Power of equity in absence of statute to render deficiency judgment in foreclosure action, 34 A.L.R. 1015.

Reformation as condition of assertion of right of action or defense predicated on the true contract differing from that evidenced by the written instrument; and right to both reformation and other relief in same action or suit, 66 A.L.R. 763.

Remedy and procedure to avoid release or satisfaction of judgment, 9 A.L.R.2d 553.

23-3-4. Extraordinary remedies for defendant.

Any defendant may, by proper pleadings and sufficient evidence, obtain the benefit of extraordinary remedies allowed in equitable proceedings by the superior court.

History. — Ga. L. 1884-85, p. 36, § 2; Civil Code 1895, § 4838; Civil Code 1910, § 5411; Code 1933, § 37-906.

JUDICIAL DECISIONS

The purpose of former Code 1933, § 37-906 (see O.C.G.A. § 23-3-4) was is to vest in the superior court authority under this article and O.C.G.A. §§ 23-4-2

and 23-4-3 to settle in one suit a controversy between parties. Clay v. Smith, 207 Ga. 610, 63 S.E.2d 602 (1951).

Action arising out of general plan between parties must be asserted in one action. — Where a trover action was filed in a superior court, and thereafter the defendant filed, in a different superior court, an equitable action, to enjoin the trover action, and for other relief, so far as the petition alleged any defense or cause of complaint against any of the parties named as defendants, the same could have been asserted as effectually by way of defense or counterclaim in the trover proceeding, and the allegations did not show any necessity for an independent equitable action. Hamilton v. First Nat'l Bank, 180 Ga. 820, 180 S.E. 840 (1935).

Where proceeding to enjoin an action against plaintiff to cancel a sale of plaintiff's property by defendant as well as the note on which the defendant is suing arose out of same general plan between the parties to develop and operate a recreational place, defendant in action on note by answer and counterclaim must assert all his claims for legal and equitable relief arising out of the general plan between the parties, and could not bring an independent action to enjoin action on the note and litigate those matters. Clay v. Smith, 207 Ga. 610, 63 S.E.2d 602 (1951).

After an ancillary petition seeking possession of property is filed, the court may cause other parties to be made, where they are asserting some rights affecting the property and while a claimant in possession may not be subject to summary dispossession by the sheriff under the warrant sued out, the superior court has authority, under its broad powers, to make the claimant a party in order to settle the rights of all parties in one action, without remitting the petitioner in the ancillary proceeding to a common-law action of ejectment. Voyles v. Federal Land Bank, 182 Ga. 569, 186 S.E. 405 (1936).

Ancillary issues triable in dispossessory proceeding. — While former Code 1933, §§ 39-1309 and 39-1312 (see O.C.G.A. § 9-13-175) forbid a sheriff to put a purchaser in possession of land sold by the sheriff, when another person is in possession and has held it adversely to the defendant in fi. fa. from a time before the judgment against such defendant, the purchaser, when brought into equity by the party in possession, may, by answer and counterclaim, make such issues as to fraudulent and collusive title as necessarily would arise in an action of ejectment between the same parties. Voyles v. Federal Land Bank, 182 Ga. 569, 186 S.E. 405 (1936).

Ancillary petition may be filed after as well as before a decree to enable a superior court to effectuate its own decree by ordering one put in possession of property when entitled thereto under its original decree, in order to avoid the further litigation of questions once settled between the same parties. Voyles v. Federal Land Bank, 182 Ga. 569, 186 S.E. 405 (1936).

Cited in McCall v. Fry, 120 Ga. 661, 48 S.E. 200 (1904); McMillian v. Spencer, 162 Ga. 659, 134 S.E. 921 (1926); O'Leary v. Costello, 169 Ga. 754, 151 S.E. 487 (1930); Tanner v. Wilson, 183 Ga. App. 53, 187 S.E. 625 (1936); Hicks v. Atlanta Trust Co., 187 Ga. 314, 200 S.E. 301 (1938); Hoxie v. Americus Auto. Co., 73 Ga. App. 686, 37 S.E.2d 808 (1946); Georgia Power Co. v. Mayor of Athens, 206 Ga. 513, 57 S.E.2d 573 (1950).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 19, 194 et seq.

ALR. — Power of equity in absence of statute to render deficiency judgment in foreclosure action, 34 A.L.R. 1015.

ARTICLE 2
NE EXEAT

Cross references. — Attachment, T. 18, C. 3.

RESEARCH REFERENCES

Am. Jur. 2d. — 57 Am. Jur. 2d, Ne Exeat, § 1 et seq.

23-3-20. Nature of ne exeat; when granted.

The writ of ne exeat shall issue to restrain a person from leaving the jurisdiction of the state. The writ may be granted in the following cases:

(1) In favor of an obligor, promisor, or partner, against his co-obligor, joint promisor, or copartner equally or partly responsible with him for any duty to be performed;

(2) Against persons illegally removing the property of a decedent or of a minor, at the instance of any person interested therein, or of a next friend of the minor;

(3) At the instance of a remainderman or reversioner against anyone attempting to remove the property in which the remainder or reversion exists or may contingently exist;

(4) At the instance of a mortgagee against a person holding the equity of redemption;

(5) At the instance of any person interested legally or equitably in property about to be removed, where no adequate remedy is afforded at law.

History. — Laws 1814, Cobb's 1851 Digest, p. 526; Code 1863, § 3147; Code 1868, § 3159; Code 1873, § 3226; Code 1882, § 3226; Civil Code 1895, § 4886; Civil Code 1910, § 5459; Code 1933, § 37-1401.

JUDICIAL DECISIONS

Analysis

General Consideration
Application of Section
Conditions Which Render Writ Cancelled or Illegal
Pleading and Practice
1. In General
2. Service of Writ
3. Breach of Writ

General Consideration

History generally. — See McGee v. McGee, 8 Ga. 295, 52 Am. Dec. 407 (1850) Lamar v. Lamar, 123 Ga. 827, 51 S.E. 763, 107 Am. St. R. 169, 3 Ann. Cas. 294 (1905).

Compliance with conditions of bond generally. — A ne exeat bond is one for the personal appearance of the defendant at court; and the conditions of the bond are complied with when the principal is present at court, or within the court's jurisdiction and subject to its process. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Cited in May v. May, 146 Ga. 521, 91 S.E. 687 (1917); Shaw v. Jordan, 178 Ga. 733, 174 S.E. 350 (1934); Roberts v. Roberts, 190 Ga. 649, 10 S.E.2d 62 (1940); Hutton v. Hutton, 243 Ga. 263, 254 S.E.2d 380 (1979).

Application of Section

Section contemplates action only in advance of a final judgment and there is no reference to any right to the issuance of writ after a final judgment had been obtained. Lomax v. Lomax, 176 Ga. 605, 168 S.E. 863 (1933).

This section is not directed to the enforcement of a judgment against one who has removed the property, but is evidently directed to restrain future removal. Lomax v. Lomax, 176 Ga. 605, 168 S.E. 863 (1933).

Plainly, this section is not to enforce an adjudication in which it has been adjudged that the duty must be performed. Lomax v. Lomax, 176 Ga. 605, 168 S.E. 863 (1933).

The petition must state that the defendant is removing or about to remove, either the property or himself, from the state. Reed v. Barber, 110 Ga. 524, 35 S.E. 650 (1900).

Sometimes the writ of ne exeat is issued only to restrain a person from leaving the jurisdiction of the state; sometimes it is issued against a person who is removing, or attempting to remove, property beyond the jurisdiction. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Writ may issue pending application for alimony. — The writ of ne exeat may be granted in this state at the instance of a wife against her husband pending an application for alimony, and prior to any decree therefor. Lamar v. Lamar, 123 Ga. 827, 51 S.E. 763 (1905); Pepper v. Pepper, 169 Ga. 832, 152 S.E. 103 (1930).

This section does not refer to a mortgagee who has foreclosed, since the right is given only against a person holding the equity of redemption. Lomax v. Lomax, 176 Ga. 605, 168 S.E. 863 (1933).

Writ will issue against an attorney who has collected and refused to pay over money belonging to a client. Conyers v. Gray, 67 Ga. 329 (1881).

Conditions Which Render Writ Cancelled or Illegal

If the condition of a bail bond is more onerous than to compel the appearance of the principal defendant, it is illegal and void. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Where a writ required the taking of a bond, not only for the personal appearance of the defendant, but for the payment of the judgment in the suit for alimony, the writ was void. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

If the application for the issuance of the writ of ne exeat is made in connection with an application for alimony, and no removal of property is involved, but merely an intended leaving of the state by the defendant, the judge ought not to require a bond conditioned both that the defendant will not remove beyond the jurisdictional limits of the state, and also that he will pay any judgment that may be found against him in favor of the plaintiff. This would not only require the husband to give security that he would remain in the jurisdiction, but also that he would be solvent and pay the money judgment. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Where the provisions of the bond so vary from those prescribed by this section so as to increase the risk of the securities the bond is not binding on them. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Writ became functus officio. — Writ of ne exeat issues to restrain a person from leaving the jurisdiction of the state;

Conditions Which Render Writ Cancelled or Illegal (Cont'd)

and where principal in a ne exeat bond appears and defends suit against him for divorce and alimony, and is within the jurisdiction of the court when the final judgment is rendered against him, subject to processes of the court, such writ becomes functus officio, and upon motion the court should declare the bond cancelled and the sureties therein discharged. May v. May, 146 Ga. 521, 91 S.E. 687 (1917); Lomax v. Lomax, 176 Ga. 605, 168 S.E. 863 (1933).

Pleading and Practice

1. In General

Ne exeat, not injunction, is the proper remedy to restrain a purchasing partner from leaving the state without paying debts assumed by him. Bleyer v. Blum & Co., 70 Ga. 558 (1883); Tucker v. Murphey, 114 Ga. 662, 40 S.E. 836 (1902).

2. Service of Writ

By reason of its very nature, service of a writ of ne exeat is not required. Chlupacek v. Reed, 225 Ga. 512, 169 S.E.2d 782 (1969).

3. Breach of Writ

Summary proceeding upon breach of writ. — Upon the breach of a ne exeat bond given in an action for alimony, the court may force payment of the bond from the surety in a summary proceeding, on an order to show cause why judgment should not be rendered on the bond. Moore v. Edmondson, 184 Ga. 818, 193 S.E. 780 (1937).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 18A Am. Jur. Pleading and Practice Forms, Ne Exeat, § 1 et seq.

C.J.S. — 65 C.J.S., Ne Exeat, § 1 et seq.

ALR. — Power to issue writ of ne exeat to prevent decree for alimony from becoming ineffective, 8 A.L.R. 327.

Rights and remedies against mortgagee under deed intended as a mortgage, who defeats or impairs equity of redemption by conveying or encumbering property, 46 A.L.R. 1089.

23-3-21. Showing required.

In every case of application for a writ of ne exeat, the complaining party shall show that no adequate remedy is afforded at law, and that the defendant is removing or about to remove himself, his property, or the specific property to which the complainant claims title or an interest.

History. — Orig. Code 1863, § 3148; Code 1868, § 3160; Code 1873, § 3227; Code 1882, § 3227; Civil Code 1895, § 4887; Civil Code 1910, § 5460; Code 1933, § 37-1402.

JUDICIAL DECISIONS

A statutory bond must follow closely the statute, and if the provisions of the bond so vary from those prescribed by the statute as to increase the risk of the securities the bond is not binding on them. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

If the application for the issuance of the writ of ne exeat is made in connection with an application for alimony, and no

removal of property is involved, but merely an intended leaving of the state by the defendant, the judge ought not to require a bond conditioned both that the defendant will not remove beyond the jurisdictional limits of the state, and also that he will pay any judgment that may be found against him in favor of the plaintiff. This would not only require the husband to give security that he would remain in the jurisdiction, but also that he would be solvent and pay the money judgment. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Issuance of writ generally. — Sometimes the writ of ne exeat is issued only to restrain a person from leaving the jurisdiction of the state; sometimes it is issued against a person who is removing, or attempting to remove, property beyond the jurisdiction. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Danger of loss will be inferred from the fact alone that the defendant resides out of the state. McGehee v. Polk, 24 Ga. 406 (1858).

Declarations by the defendant that he intended to leave, followed by an answer that he did not then intend to leave, will not prevent the issuance of the writ. Conyers v. Gray, 67 Ga. 329 (1881).

Writ issues only when the party cannot be held to bail at law. Hannahan v. Nichols, 17 Ga. 77 (1855).

Ne exeat bond will be dissolved when there is other appropriate relief. Hawthorn v. Kelly, 30 Ga. 965 (1860).

A ne exeat bond is one for the personal appearance of the defendant at court; and the conditions of the bond are complied with when the principal is present at court, or within its jurisdiction and subject to its process. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

If the condition of a bail bond is more onerous than to compel the appearance of the principal defendant, it is illegal and void. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 4.

C.J.S. — 30 C.J.S., Equity, § 77. 65 C.J.S., Ne Exeat, § 8.

23-3-22. Verification necessary; bond and additional verification at judge's discretion.

(a) In every application for a writ of ne exeat, the petition or motion must be verified by one or more of the complainants.

(b) The judge may, in his discretion, require the complainant to give bond and security for the payment of any damages which the defendant may recover from him for obtaining the writ, before granting an order for the issuing of the same, and may require a verification by all or any of the complainants.

History. — Ga. L. 1855-56, p. 219, § 4; Ga. L. 1857, p. 109, § 1; Code 1863, § 3151; Code 1868, § 3163; Code 1873, § 3230; Code 1882, § 3230; Civil Code 1895, § 4890; Civil Code 1910, § 5463; Code 1933, § 37-1405.

JUDICIAL DECISIONS

Verification generally. — Resort must be had to the charges in the petition to decide whether the facts are sufficient to entitle the complainants to the writ. McGehee v. Polk, 24 Ga. 406 (1858).

Verification by agent. — An agent

may verify the application, for writ of ne exeat, provided he states the facts as positively and distinctly as is required of the complainant himself. But this does not deprive the court of the power to require the verification to be by the complainant in person. Orme v. McPherson, 36 Ga. 571 (1867). See also, Old Hickory Distilling Co. v. Bleyer, 74 Ga. 201 (1884).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, §§ 254 et seq., 518 et seq.

C.J.S. — 30 C.J.S., Equity, § 77.

23-3-23. Defendant's bond; responsibility of officer taking insufficient security.

The defendant may relieve himself, his property, or the specific property from the restraint imposed by giving bond in double the value of plaintiff's claim, with good security, to the officer serving the process, for the forthcoming of each or either, according to the tenor of the writ, to answer to complainant's claim or abide by the order and decree of the court. The judge granting the writ may, in his discretion, require a larger bond. An officer receiving insufficient security shall be held surety himself, and the sureties on his bond may be held responsible therefor.

History. — Laws 1830, Cobb's 1851 Digest, p. 527; Code 1863, § 3149; Code 1868, § 3161; Code 1873, § 3228; Code 1882, § 3228; Civil Code 1895, § 4888; Civil Code 1910, § 5461; Code 1933, § 37-1403.

JUDICIAL DECISIONS

Question of whether a writ of ne exeat can issue ex parte cannot be raised by a demurrer (now motion to dismiss) to a petition in an action on the bond. Goldstein v. Jackson, 97 Ga. App. 28, 101 S.E.2d 869 (1958).

Writ of ne exeat must be issued prior to a final judgment. The writ is not available to enforce a judgment which has already been obtained. The rule of the common law, whereby the writ of ne exeat issued only after judgment, is not of force in this state, since the common law as to this point has been superseded. Matthews v. Matthews, 177 Ga. 412, 170 S.E. 250 (1933).

Ne exeat bond is one for the personal appearance of the defendant at court; and the conditions of the bond are complied with when the principal is present at court, or within its jurisdiction and subject to its process. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Court's order determines conditions of bond. — The requirements of this section as to what condition or conditions must be given in a ne exeat bond are dependent upon the requirements of the court's order, upon which the writ is issued. Goldstein v. Jackson, 97 Ga. App. 28, 101 S.E.2d 869 (1958).

Where the court's order only requires an appearance to respond, the principal is required only to give a bond to meet that requirement. The inclusion of more conditions in the bond than required in the order does not render the bond void, and the principal and surety will be bound only by the condition contained in the bond which was required by the court's order. Goldstein v. Jackson, 97 Ga. App. 28, 101 S.E.2d 869 (1958).

A statutory bond must follow closely the statute, and if the provisions of the bond so vary from those prescribed by the statute as to increase the risk of the securities the bond is not binding on them. August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

When the application for the issuance of the writ of ne exeat is made in connection with an application for alimony, and no removal of property is involved, but merely an intended leaving of the state by the defendant, the judge ought not to require a bond conditioned both that the defendant will not remove beyond the jurisdictional limits of the state, and also that he will pay any judgment that may be found against him in favor of the plaintiff. This would not only require the husband to give security that he would remain in the jurisdiction, but also that he would be solvent and pay the money judgment. McGee v. McGee, 8 Ga. 295, 52 Am. Dec. 407 (1850); Pounds v. Pounds, 136 Ga. 196, 71 S.E. 137 (1911); August v. August, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Cited in Bleyer v. Blum & Co., 70 Ga. 558 (1883); Pepper v. Pepper, 169 Ga. 832, 152 S.E. 103 (1930); Jordan v. Sexton, 42 Ga. App. 218, 155 S.E. 356 (1930); Lomax v. Lomax, 176 Ga. 605, 168 S.E. 863 (1933); Shaw v. Jordan, 178 Ga. 733, 174 S.E. 350 (1934); Hornsby v. Rodriguez, 116 Ga. App. 234, 156 S.E.2d 830 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 523 et seq.

C.J.S. — 30 C.J.S., Equity, § 77. 65 C.J.S., Ne Exeat, § 13.

23-3-24. Disposition of property.

If the defendant fails or refuses to replevy the property, the court may, in its discretion, make such disposition of it as shall appear most advantageous to all parties.

History. — Orig. Code 1863, § 3150; Code 1868, § 3162; Code 1873, § 3229; Code 1882, § 3229; Civil Code 1895, § 4889; Civil Code 1910, § 5462; Code 1933, § 37-1404.

JUDICIAL DECISIONS

Cited in Bleyer v. Blum & Co., 70 Ga. 558 (1883); Stephens v. Carter, 215 Ga. 355, 110 S.E.2d 762 (1959); Williams v. Dienes Apparatus, Inc., 200 Ga. App. 205, 407 S.E.2d 408 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 510.

C.J.S. — 30 C.J.S., Equity, § 77. 65 C.J.S., Ne Exeat, §§ 1, 9, 10.

23-3-25. Issuance of writ without judge's sanction.

In cases of emergency, upon the affidavit of the complainant that he cannot obtain the sanction of the judge in time to remedy the mischief, the writ of ne exeat may issue at once, to continue until the first term of the court to which it is returnable, unless earlier heard by order of the judge.

History. — Orig. Code 1863, § 3152; Code 1868, § 3164; Code 1873, § 3231; Code 1882, § 3231; Civil Code 1895, § 4891; Civil Code 1910, § 5464; Code 1933, § 37-1406.

ARTICLE 3

QUIA TIMET

Cross references. — Recordation and registration of deeds and other instruments generally, T. 44, C. 2.

PART 1

CONVENTIONAL QUIA TIMET

JUDICIAL DECISIONS

Cited in Vaughan v. Vaughan, 253 Ga. 76, 317 S.E.2d 201 (1984).

23-3-40. Purpose of quia timet.

The proceeding quia timet is sustained in equity for the purpose of causing to be delivered and canceled any instrument which has answered the object of its creation or any forged or other iniquitous deed or other writing which, though not enforced at the time, either casts a cloud over the complainant's title or otherwise subjects him to future liability or present annoyance, and the cancellation of which is necessary to his perfect protection.

History. — Orig. Code 1863, § 3153; Code 1868, § 3165; Code 1873, § 3232; Code 1882, § 3232; Civil Code 1895, § 4892; Civil Code 1910, § 5465; Code 1933, § 37-1407.

Law reviews. — For article discussing the problems associated with acquiring good title, see 15 Ga. B.J. 281 (1953). For article, "Tracing Georgia's English Common Law Equity Jurisprudential Roots: Quia Timet," see 14 The Journal of Southern Legal History 135 (2006). For annual survey on local government law, see 68 Mercer L. Rev. 199 (2016). For annual survey on real property, see 71 Mercer L. Rev. 241 (2019).

JUDICIAL DECISIONS

Plaintiff in an action to quiet title must assert that the plaintiff holds some current record title or current prescriptive title, and not only an expectancy, in order to maintain the plaintiff's suit. Gilmore v. Hunt, 137 Ga. 272, 73 S.E. 364 (1910); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979).

Petition must contain a request for cancellation of an instrument, otherwise it is defective and, thus, subject to motion to dismiss. Tucker v. Ezell, 148 Ga. 47, 95 S.E. 672 (1918).

Petition should contain not mere conclusions but statements of fact showing that claimant is the true owner. Weyman v. City of Atlanta, 122 Ga. 539, 50 S.E. 492 (1905).

No right to jury trial. — Special mas-

ter did not err by denying a property owner a right to a jury trial in a buyer's quiet title action as the action was brought under the conventional quia timet statute and the owner had no right to a jury trial. Davis v. Harpagon Co., LLC, 281 Ga. 250, 637 S.E.2d 1 (2006).

Delinquent taxpayer had no right to a jury trial in a transferee's action to remove any clouds as to the title on the delinquent taxpayer's property, pursuant to O.C.G.A. § 23-3-40, to which the transferee obtained title to by the order of a special master. Human v. Harpagon Co., LLC, 281 Ga. 372, 637 S.E.2d 684 (2006).

When one seeks conventional quia timet, one is not entitled to trial by jury under O.C.G.A. § 23-3-43; when one seeks quia timet against all the world, however, one is entitled by the provisions of O.C.G.A. § 23-3-66 to a jury trial, but there is no right to a jury trial when a suit at law is converted by amendment into an equitable proceeding. Vatacs Group, Inc. v. U. S. Bank, N.A., 292 Ga. 483, 738 S.E.2d 83 (2013).

Trial court properly appointed a special master in a quiet title action and a corporation, who was unsuccessful in the corporation's claim for the property, was properly held not entitled to a jury trial because the suing bank had amended the bank's petition to provide for an action only for conventional quia timet by the time the petition was heard by the special master; therefore, no jury trial was available under O.C.G.A. § 23-3-43. Vatacs Group, Inc. v. U. S. Bank, N.A., 292 Ga. 483, 738 S.E.2d 83 (2013).

Quiet title action from tax sale. — Because a tax sale listed the wrong owner of the property to be sold and the description of the property was inconsistent, such that it was unclear which property was being sold, the bidder's deed was defective, as was the quitclaim deed of the purchaser of the property from the bidder, and accordingly, there was no merit to the purchaser's claim that it was due summary judgment on the issue of whether the owner's executrix had a right to redeem the property or whether it was barred under O.C.G.A. § 48-4-45; after the tax sale, the bidder quitclaimed the deed to the purchaser, which occurred prior to the sheriff's "administrative cancellation" of the tax sale due to procedural errors, and the purchaser's action to quiet title, pursuant to O.C.G.A. § 23-3-40 et seq., resulted in summary judgment to the executrix. Harpagon Co. v. Gelfond, 279 Ga. 59, 608 S.E.2d 597 (2005).

In a quiet title action, the owner of property at the time the property was sold at a tax sale had standing to petition for title because the owner filed the petition and the trial court ruled on the petition during the time when the owner's right to redeem existed, as the title as owner was not divested and the tax sale purchaser had no right to possess property at that time. Republic Title Company, LLC v. Freeport Title and Guaranty, Inc., 351 Ga. App. 408, 829 S.E.2d 172 (2019), cert. denied, No. S19C1616, 2020 Ga. LEXIS 168 (Ga. 2020).

Action not one to quiet title. — Action to set aside a deed that conveyed a property interest did not fit within O.C.G.A. § 23-3-40, since the plaintiff was not seeking to cancel an instrument that placed a cloud on the plaintiff's title or subjected the plaintiff to future liability. Wilson v. United States, 781 F. Supp. 779 (M.D. Ga. 1992).

Principle upon which equity will lend its aid to remove a cloud upon title is that one in the rightful possession of property is entitled to the full, quiet, and peaceful enjoyment of the same, without present annoyance and harassment, or threatened molestation. Duffee v. Jones, 208 Ga. 639, 68 S.E.2d 699 (1952).

Cancellation of deed rejected. — Allegations in petition, seeking a cancellation of a deed as a cloud upon the plaintiffs' title to an undivided two-sevenths' interest in the land, were not sufficient to constitute a cause of action as a proceeding quia timet since the petition did not allege that the deed purported to convey a complete title to a full interest in the tract. Clark v. Woody, 197 Ga. 683, 30 S.E.2d 181 (1944).

Possession not required. — Although it is the general rule that, in order for a plaintiff to maintain an equitable petition to remove a cloud upon his title, he must allege and prove possession in himself, where there is any other distinct head of

equity jurisdiction sufficient to support the action, possession of the plaintiff is not required. Sweat v. Arline, 186 Ga. 460, 197 S.E. 893 (1938); Moore v. Moore, 188 Ga. 303, 4 S.E.2d 18 (1939).

Ownership interest jeoparidized. — Where plaintiff seeks specific performance of an oral contract for the devise of property of which he is in possession but which is owned by his aunt, and alleges that distress warrants for rent have been taken against him by her, it is shown that his interest in the property is put in jeopardy by the deed. Harp v. Bacon, 222 Ga. 478, 150 S.E.2d 655 (1966).

A court of equity has jurisdiction to cancel an execution illegally issued, and this is especially true where there is nothing in the record showing or tending to show that the execution sought to be canceled had been levied on any of the plaintiff's property when the litigation was instituted. Lenett v. Lutz, 215 Ga. 369, 110 S.E.2d 628 (1959).

Recovery of rents and profits. — In a suit to recover and cancel the deeds of the defendant as clouds on the plaintiff's title, the plaintiff, if entitled to recover the land, may also recover the rents and profits while possession of the land was wrongfully withheld by the defendant. Marshall v. Pierce, 136 Ga. 543, 71 S.E. 893 (1911).

Summary judgment proper once security deed paid in full. — In an action to remove a cloud from title, the trial court properly granted summary judgment to a bank and cancelled a recorded deed in favor of a holder, as: (1) the holder could no longer claim any legal title to the subject property once the underlying debt thereto was paid; (2) no evidence of valid renewal or extension of the note existed; and (3) the holder lacked standing to challenge any foreclosure on the debt. Northwest Carpets, Inc. v. First Nat'l Bank, 280 Ga. 535, 630 S.E.2d 407 (2006).

Employed against deed or writing. — Special master erred in concluding that the property purchaser's action to quiet title was a conventional quia timet employed to quiet title, as that action was used to quiet title as to a deed or other writing which casts a cloud over a title, whereas the property purchaser's action was a quia timet action against all the world; however, no error occurred in denying the property claimant's motion for a jury trial even though an action against the entire world allowed for one, as the evidence did not present a question of fact that required a jury. Gurley v. E. Atlanta Land Co., 276 Ga. 749, 583 S.E.2d 866 (2003).

Prerequisites not met. — Plaintiff's claim failed because plaintiff had not alleged that plaintiff paid off the mortgage loan in full to satisfy the Security Deed or that plaintiff's signature on the Security Deed was false. Bowman v. U.S. Bank Nat'l Ass'n, No. 1:12-cv-04263-JOF, 2013 U.S. Dist. LEXIS 149660 (N.D. Ga. Aug. 1, 2013).

Decedent's estate administrator's claim for conventional quiet title failed because the decedent did not hold some current record title or current prescriptive title upon execution of a security deed when the amount thereunder had not been fully paid. Shannon v. Albertelli Firm, P.C., No. 14-11832, 2015 U.S. App. LEXIS 7552 (11th Cir. May 7, 2015) (Unpublished).

State immune from suit. — Sovereign immunity barred a conventional quiet title action against the state, which was immune from suit. TDGA, LLC v. CBIRA, LLC, 298 Ga. 510, 783 S.E.2d 107 (2016).

Cited in Thompson v. Etowah Iron Co., 91 Ga. 538, 17 S.E. 663 (1893); Felder v. Paulk, 165 Ga. 135, 139 S.E. 873 (1927); Simpson v. Ray, 180 Ga. 395, 178 S.E. 726 (1935); Allen v. Bemis, 193 Ga. 556, 19 S.E.2d 516 (1942); Stow v. Hargrove, 203 Ga. 735, 48 S.E.2d 454 (1948); McDaniel v. Bagby, 204 Ga. 750, 51 S.E.2d 805 (1949); Todd v. Conner, 220 Ga. 173, 137 S.E.2d 614 (1964); Giddings v. Starks, 242 Ga. 457, 249 S.E.2d 203 (1978); Walker v. Walker, 266 Ga. 414, 467 S.E.2d 583 (1996); Davis v. Harpagon Co., LLC, 283 Ga. 539, 661 S.E.2d 545 (2008); Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010); Richards v. Wells Fargo Bank, N.A., 325 Ga. App. 722, 754 S.E.2d 770 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, §§ 2, 16, 63.

C.J.S. — 30 C.J.S., Equity, § 40.

ALR. — Doctrine of after-acquired title as between one who took before and one who took after common grantor or mortgagor acquired title, 25 A.L.R. 83.

Right of vendor in contract for sale or exchange of real property to bring suit for forfeiture, foreclosure, or rescission, or to quiet title or recover possession, without first giving notice, or making demand for possession, 94 A.L.R. 1239.

Joinder of claims to separate parcels in suit to quiet or to remove cloud on title, or to determine adverse claims to land, 118 A.L.R. 1400.

Common source of title doctrine, 5 A.L.R.3d 375.

23-3-41. When relief granted; costs.

(a) In all proceedings quia timet or proceedings to remove clouds upon titles to real estate, if a proper case is made, the relief sought shall be granted to any complainant irrespective of whether the invalidity of the instrument sought to be canceled appears upon the face of the instrument or whether the invalidity appears or arises solely from facts outside of the instrument.

(b) In such cases the costs shall be taxed against the litigants in the discretion of the court.

History. — Ga. L. 1905, p. 102, §§ 1, 2; Civil Code 1910, §§ 5466, 5467; Code 1933, §§ 37-1408, 37-1409.

Law reviews. — For article discussing the problems with acquiring good title, see 15 Ga. B.J. 281 (1953).

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Cited in Mayor of Gainesville v. Dean, 124 Ga. 750, 53 S.E. 183 (1906); Hale v. Turner, 183 Ga. 593, 189 S.E. 10 (1936); Allen v. Bemis, 193 Ga. 556, 19 S.E.2d 516 (1942); Todd v. Conner, 220 Ga. 173, 137 S.E.2d 614 (1964); Harp v. Bacon, 222 Ga. 478, 150 S.E.2d 655 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, §§ 2, 16, 63.

C.J.S. — 30 C.J.S., Equity, § 40.

ALR. — Use of property by public as affecting acquisition of title by adverse possession, 56 A.L.R.3d 1182.

23-3-42. Cloud on title; what constitutes; when removable.

An instrument which, by itself or in connection with proof of possession by a former occupant or other extrinsic facts, gives the claimant thereunder an apparent right in or to the property may constitute a cloud on the title of the true owner; and the latter may proceed to have the same removed upon proof:

(1) That he cannot immediately or effectually maintain or protect his rights by any other course of proceeding open to him;

(2) That the instrument sought to be canceled is such as would operate to throw a cloud or suspicion upon his title and might be vexatiously or injuriously used against him;

(3) That he either suffers some present injury by reason of the hostile claim of right or, though the claim has not been asserted adversely or aggressively, he has reason to apprehend that the evidence upon which he relies to impeach or invalidate the same as a claim upon his title may be lost or impaired by lapse of time.

History. — Civil Code 1895, § 4893; Civil Code 1910, § 5468; Code 1933, § 37-1410.

Law reviews. — For article discussing the problems with acquiring good title, see 15 Ga. B.J. 281 (1953).

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Analysis

General Consideration
Removal of Cloud Generally

General Consideration

This section is derived from the decision in Thompson v. Etowah Iron Co., 91 Ga. 538, 17 S.E. 663 (1893).

"Cloud upon title" defined. — In order for an outstanding conveyance to be a cloud upon title, it is necessary that it of itself, or in connection with alleged extrinsic facts, should constitute an apparent title; that is, one upon which a recovery could or might be had against the true owner were he in possession and relying upon possession alone. Anything which would force him to attack the adverse title, or to exhibit his own, would be a cloud; anything which would not have this effect, would be no cloud. An instrument which springs from no definite source whatsoever, for example, from a stranger to the title, can never properly be considered a cloud. Thompson v. Etowah Iron Co., 91 Ga. 538, 17 S.E. 663 (1893); McMullen v. Cooper, 125 Ga. 435, 54 S.E. 97 (1906).

The following instruments have been canceled as clouds in: Israel v. Wolf, 100 Ga. 339, 28 S.E. 109 (1897) (a will); Adams v. Johnson, 129 Ga. 611, 59 S.E. 269 (1907) (will of property not owned by testator, but not before probate); Denham v. Walker, 93 Ga. 497, 21 S.E. 102 (1893) (deed with condition subsequent after condition broken); Fulgham v. Pate, 77 Ga. 454 (1886) (void sale of property by wife to husband); Brewton v. Smith, 28 Ga. 442 (1859) (void deed); Wynne v. Lumpkin, 35 Ga. 208 (1866) (illegal deed); Walker v. Hunter, 27 Ga. 336 (1859) (deed without consideration); Graham v. Hall, 68 Ga. 354 (1882) (deed based upon illegal judgment); Butler v. Durham, 2 Ga. 413 (1847) (deed functus officio); Smith v. Burrus, 139 Ga. 10, 76 S.E. 362 (1912) (forged deed).

Cited in Morris v. Mobley, 171 Ga. 224, 155 S.E. 8 (1930); Hadaway v. Hadaway, 192 Ga. 265, 14 S.E.2d 874 (1941); Fairview Terrace, Inc. v. Roberts, 215 Ga. 407, 110 S.E.2d 641 (1959); Collins v. Storer Broadcasting Co., 217 Ga. 41, 120 S.E.2d 764 (1961); Drake v. Barrs, 225 Ga. 597, 170 S.E.2d 684 (1969).

Removal of Cloud Generally

Removal of cloud requires proof of possession. — The general rule is that, in order for a plaintiff to maintain an equitable petition to remove a cloud upon his title, he must allege and prove actual possession in himself, for the reason that

where the defendant is in possession, the plaintiff has a remedy to test his title at law by bringing an action in ejectment, which is ordinarily deemed an adequate remedy, and there is no ground for the exercise of equitable jurisdiction. Hale v. Turner, 183 Ga. 593, 189 S.E. 10 (1936).

Except where there is any other distinct head of equity jurisdiction sufficient to support the action, possession by the plaintiff is not required, but equity will retain the cause and grant relief by quieting the title or removing clouds. Hale v. Turner, 183 Ga. 593, 189 S.E. 10 (1936); Sweat v. Arline, 186 Ga. 460, 197 S.E. 893 (1938).

A senior unrecorded deed loses its priority over a junior recorded deed for value from the same vendor, taken without knowledge or notice of the existence of the senior deed, and in a proper case may be canceled at the instance of the grantee in such junior recorded deed. Terry v. Ellis, 189 Ga. 698, 7 S.E.2d 282 (1940).

When land is wild and unoccupied, or at least not in the actual possession of the defendant, the plaintiff need not be in possession in order to maintain suit to quiet title or remove cloud therefrom. Hale v. Turner, 183 Ga. 593, 189 S.E. 10 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, §§ 2, 16, 63.

C.J.S. — 30 C.J.S., Equity, §§ 29, 39, 57.

ALR. — Doctrine of after-acquired title as between one who took before and one who took after common grantor or mortgagor acquired title, 25 A.L.R. 83.

Return of payments as condition of cancellation of land contract as cloud on title, 35 A.L.R. 274.

Right of one not in possession to maintain suit to remove cloud on title in case of fraud, 36 A.L.R. 698.

What constitutes cloud on title removable in equity, 78 A.L.R. 24.

Right of vendor in contract for sale or exchange of real property to bring suit for forfeiture, foreclosure, or rescission, or to quiet title or recover possession, without first giving notice, or making demand for possession, 94 A.L.R. 1239.

Remedies of grantor who has conveyed with covenants against third person asserting title or interest hostile to covenants, 97 A.L.R. 711.

Marketability of title derived from or through, or affected by possible claim of, infant, 24 A.L.R.2d 1306.

Maintainability, by lessee, of action to quiet title to leasehold, 51 A.L.R.2d 1227.

Use of property by public as affecting acquisition of title by adverse possession, 56 A.L.R.3d 1182.

23-3-43. Special master.

At the option of the complainant as prayed for in the complaint, the court, upon receipt of the complaint, shall submit the same to a special master as provided for in Code Sections 23-3-63 through 23-3-68, except that as in other equity cases there shall be no right to a jury trial.

History. — Code 1981, § 23-3-43, enacted by Ga. L. 2000, p. 1408, § 1.

Law reviews. — For article, "The New Special Master Rule — Uniform Superior Court Rule 46: Life Jackets for the Courts in the Perfect Storm," see 15 (No. 4) Ga. St. B. J. 20 (2009). For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

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Authority of special master and judge. — In submitting a quiet title case to the special master, the trial court did not cede jurisdiction to render a final decision as although the trial court was not required to hear exceptions to the special master's report, the trial court had to independently evaluate the correctness of the report before adopting the report as judgment and it was the trial court, not the special master, who ordered disbursement of excess funds following the tax sale. Republic Title Company, LLC v. Freeport Title and Guaranty, Inc., 351 Ga. App. 408, 829 S.E.2d 172 (2019), cert. denied, No. S19C1616, 2020 Ga. LEXIS 168 (Ga. 2020).

Payment of special master's fees not prerequisite to appeal. — Provisions of O.C.G.A. § 9-7-22(c) requiring the payment of auditors' fees prior to the filing of an appeal did not apply to special masters appointed under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq., pursuant to O.C.G.A. §§ 23-3-43 and 23-3-63, and an appeal was not dismissed due to failure to pay the special master's fees. Davis v. Harpagon Co., LLC, 300 Ga. App. 644, 686 S.E.2d 259 (2009) was overruled to the extent it was to the contrary. Nix v. 230 Kirkwood Homes, LLC, 300 Ga. 91, 793 S.E.2d 402 (2016).

No notice or hearing required. — When a defendant who asserted a quiet title claim against the plaintiffs requested a special master, the trial court was required to submit the claim to a special master, and no notice or hearing on the matter was required; once submitted, the special master had complete jurisdiction to determine the quiet title claim. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Sua sponte appointment improper. — Trial court's sua sponte appointment of a special master, over the siblings' objection, was in direct contravention of Georgia law. Patel v. Patel, 342 Ga. App. 81, 802 S.E.2d 871 (2017).

Jury trial unavailable. — While a special master erred in concluding the property purchaser's action to quiet title was a conventional quia timet action, and, thus, no jury trial was available to the property claimant, the claimant was not harmed by the error; although a jury trial was available regarding the property purchaser's action in quia timet as against all the world, the property claimant did not show that the evidence presented a question of fact, and, thus, the intervention of a jury was not required. Gurley v. E. Atlanta Land Co., 276 Ga. 749, 583 S.E.2d 866 (2003).

Trial court properly appointed a special master in a quiet title action and a corporation, who was unsuccessful in the corporation's claim for the property, was properly held not entitled to a jury trial because the suing bank had amended the bank's petition to provide for an action only for conventional quia timet by the time it was heard by the special master; therefore, no jury trial was available under O.C.G.A. § 23-3-43. Vatacs Group, Inc. v. U. S. Bank, N.A., 292 Ga. 483, 738 S.E.2d 83 (2013).

23-3-44. Redemption and notice.

Proceedings quia timet may be used to remove clouds on title caused by equities of redemption following tax sales; provided, however, that the length of time for redemption shall remain as provided by law and nothing in this Code section shall preclude the necessity of giving all parties at interest notice of this proceeding.

History. — Code 1981, § 23-3-44, enacted by Ga. L. 2000, p. 1408, § 1; Ga. L. 2001, p. 4, § 23; Ga. L. 2001, p. 4, § 23.

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Cited in Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Part 2

Quia Timet Against All the World

JUDICIAL DECISIONS

Proper use of Quiet Title Act found. — Petition to remove a 20-year leasehold interest as a cloud on the title of property was a proper use of the Quiet Title Act. Cowron & Co. v. Shehadeh, 268 Ga. 383, 490 S.E.2d 82 (1997).

Written findings required. — Trial court abused the court's discretion when the court granted the association judgment on the association's counterclaim to quiet title without making any specific declaration thereto as the Quiet Title Act, O.C.G.A. § 23-3-60 et seq., required that a trial court make written findings of fact when ruling on such a claim. Holman v. Glen Abbey Homeowners Ass'n, No. A20A0895, 2020 Ga. App. LEXIS 437 (July 28, 2020).

Findings of master and court to be upheld unless erroneous. — In an action to quiet title brought under O.C.G.A. § 23-3-60, et seq., the findings of the special master and adopted by the trial court will be upheld unless clearly erroneous. Seignious v. Metropolitan Atlanta Rapid Transit Auth., 252 Ga. 69, 311 S.E.2d 808 (1984).

23-3-60. Purpose of part.

The purpose of this part is to create a procedure for removing any cloud upon the title to land, including the equity of redemption by owners of land sold at tax sales, and for readily and conclusively establishing that certain named persons are the owners of all the interests in land defined by a decree entered in such proceeding, so that there shall be no occasion for land in this state to be unmarketable because of any uncertainty as to the owner of every interest therein.

History. — Ga. L. 1966, p. 443, § 11.

Law reviews. — For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010). For annual survey on real property, see 65 Mercer L. Rev. 233 (2013). For annual survey on local government law, see 68 Mercer L. Rev. 199 (2016). For annual survey on real property, see 71 Mercer L. Rev. 241 (2019).

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Prerequisites not met. — Plaintiff could not succeed on a claim pursuant to O.C.G.A. § 23-3-60 because the plaintiff had not alleged many of the statutory prerequisites to this claim, such as including a particular description of the land involved in the proceeding, including a plat survey of the land, including a copy of the instrument upon which the plaintiff's interest was based, and providing the name and address of possible adverse claimants. Bowman v. U.S. Bank Nat'l Ass'n, No. 1:12-cv-04263-JOF, 2013 U.S. Dist. LEXIS 149660 (N.D. Ga. Aug. 1, 2013).

Sovereign immunity not applicable

to in rem quiet title action. — Sovereign immunity was not applicable to an in rem quiet title action against all the world under O.C.G.A. § 23-3-60 as such an action was against the underlying property itself. TDGA, LLC v. CBIRA, LLC, 298 Ga. 510, 783 S.E.2d 107 (2016).

Attorney fees and expenses. — Plaintiff who brought an action to quiet title and for partitioning of property was not entitled to an award of attorney fees and expenses since the statutes providing for such actions do not provide for attorney fees and expenses and such an award was not authorized if the case was considered one at law. Walker v. Walker, 266 Ga. 414, 467 S.E.2d 583 (1996).

Trial court erred by denying the defendant's motions for a directed verdict or JNOV on the issue of attorney fees under O.C.G.A. § 13-6-11 because the jury found no bad faith in the underlying quiet title action between the parties and the mere fact that the defendant's action had caused an issue which later required litigation to correct did not in and of itself provide a basis for an award; plus, any conduct during litigation could not support an award under § 13-6-11. Bowen v. Laird, 348 Ga. App. 1, 821 S.E.2d 105 (2018).

Unbroken chain of title not established. — In order to show an unbroken chain of title, it was necessary for the plaintiff to show that persons who deeded the land were the heirs-at-law of the prior owner who had died intestate; because the plaintiff failed to establish this fact, the court was not required to find in the plaintiff's favor, and involuntary dismissal of the action was not in error. Smith v. Georgia Kaolin Co., 269 Ga. 475, 498 S.E.2d 266 (1998).

Landowner's right to property established. — Findings entered by a Special Master, which determined that the disputed portion of an alley belonged to a landowner, and not the neighbors, by operation of the landowner's prior recorded deed, was not clearly erroneous, as: (1) the landowner received the property via a valid deed; (2) the neighbors failed to put the landowner on notice of their claim; and (3) the neighbors' claim of possession and use was insufficient. Cernonok v. Kane, 280 Ga. 272, 627 S.E.2d 14 (2006).

In a dispute over an easement in an action to quiet title filed pursuant to O.C.G.A. § 23-3-60 et seq., the trial court granted summary judgment to plaintiff landowners, finding that they had title to the easement as delineated in the parties' plats, and permanently enjoined defendant adjacent landowners from interfering with use of that easement. Thus, a special master properly concluded that there was not clear and unequivocal evidence of an intention to abandon the easement, which had been acquired by grant, and that the mere nonuse of the easement for a period of time was insufficient to establish its abandonment. Whipple v. Hatcher, 283 Ga. 309, 658 S.E.2d 585 (2008).

Landowner's right to property not established. — Judgment of the trial court that a landowner did not have title to property by virtue of a deed was not error because by its express description, the deed upon which the landowner relied did not convey an interest in the subject property; the deed set forth a metes and bounds description that corresponded to the landowner's house and surrounding lot only, and the description did not include the subject property. Bailey v. Moten, 289 Ga. 897, 717 S.E.2d 205 (2011).

Neighbor's right to property established. — Because the neighbors' actual adverse possession was inconsistent with and prevailed over the owners' mere constructive possession under O.C.G.A. § 44-5-166(a), the trial court did not err in entering the court's judgment and decree in favor of the neighbors under O.C.G.A. § 23-3-60. Sacks v. Martin, 284 Ga. 712, 670 S.E.2d 417 (2008).

It was not error for the trial court to adopt the special master's conclusion that title to certain property was vested in a landowner's neighbor because the neighbor's quitclaim deed was the only deed placed before the special master that described an interest in the subject property. Bailey v. Moten, 289 Ga. 897, 717 S.E.2d 205 (2011).

Tender required. — In cases involving mortgages, Georgia law required that a party first tender the amount due under the note and security deed before seeking

the equitable remedy of quiet title; the complaint did not allege that the plaintiff attempted to tender the amount due and defendants refused it, or that the defendants were likely to refuse such an offer. Moreover, the allegations in the complaint did not plausibly support the notion that the plaintiff owned the subject property free and clear, so the plaintiff's quiet title action failed. Warthen v. Litton Loan Servicing LP, No. 1:11-cv-02704-JEC, 2012 U.S. Dist. LEXIS 135748 (N.D. Ga. Mar. 23, 2012).

Used to remove any cloud of title. — Special master erred in concluding that the property purchaser's action to quiet title was a conventional quia timet employed to quiet title, as that action was used to quiet title as to a deed or other writing which casts a cloud over a title, whereas the property purchaser's action was a quia timet action against all the world; however, no error occurred in denying the property claimant's motion for a jury trial even though an action against the entire world allowed for one, as the evidence did not present a question of fact that required a jury. Gurley v. E. Atlanta Land Co., 276 Ga. 749, 583 S.E.2d 866 (2003).

Implied easement not shown. — In submitting a quiet title case to a special master, a trial court did not cede jurisdiction to render a final decision, and was not obligated to accept a special master's erroneous legal conclusion; a trial court properly rejected a special master's finding that an implied easement was established because access to an owner's home across a neighbors' property was unnecessary, but merely convenient, and because the owner's deed made no mention of a plat allegedly relied on by the owner or a right of way bordering the property, and the plat itself was not recorded. Eardley v. McGreevy, 279 Ga. 562, 615 S.E.2d 744 (2005).

Adverse possession. — In a quiet title action under O.C.G.A. § 23-3-60 et seq., appellee alleged property owner established adverse possession of a disputed tract because both appellee and a prior lessee used the tract in connection with their business on contiguous property leased from an estate from 1971-1999; appellee acquired title to a lot containing the tract from the estate in 1999. Steinichen v. Stancil, 284 Ga. 580, 669 S.E.2d 109 (2008).

Dismissal of quiet title claim improper. — Trial court erred in dismissing the property owner's quiet title claim because, although the bank tried to reform the deed and void the foreclosure that listed 2253 Dawnville as the property foreclosed upon, and the bank's counsel filed an affidavit of title that the bank intended the deed to encumber 2215 Dawnville, the allegations of the property owner's counterclaim disclosed that the property owner would be entitled to relief if it was determined that the property owner did in fact hold unencumbered legal title to 2215 Dawnville, and that the bank through the filing of the affidavits of title and the foreclosure and resulting deed under power, cast a cloud upon that title. Cronan v. JP Morgan Chase Bank, N.A., 336 Ga. App. 201, 784 S.E.2d 57 (2016).

Special master report properly adopted. — In a quiet title action, the trial court did not err by adopting a special master report because the report was not tainted by a conflict of interest since the special master was appointed by a stipulated conflict waiver agreed upon by the parties and there was sufficient evidence to support that only two tracts of land were conveyed to the purchaser, not four. DeCay v. Houston, 295 Ga. 223, 758 S.E.2d 286 (2014).

Jury trial available. — While a special master erred in concluding the property purchaser's action to quiet title was a conventional quia timet action, and, thus, no jury trial was available to the property claimant, the claimant was not harmed by the error; although a jury trial was available regarding the property purchaser's action in quia timet as against all the world, the property claimant did not show that the evidence presented a question of fact, and, thus, the intervention of a jury was not required. Gurley v. E. Atlanta Land Co., 276 Ga. 749, 583 S.E.2d 866 (2003).

When one seeks conventional quia timet, one is not entitled to trial by jury under O.C.G.A. § 23-3-43; when one seeks quia timet against all the world,

however, one is entitled by the provisions of O.C.G.A. § 23-3-66 to a jury trial, but there is no right to a jury trial when a suit at law is converted by amendment into an equitable proceeding. Vatacs Group, Inc. v. U. S. Bank, N.A., 292 Ga. 483, 738 S.E.2d 83 (2013).

Planned street parcel conveyed in deed to property owners. — In a quiet title action brought by property owners, a trial court properly found that since the grantor who conveyed to the owners' predecessors-in-title land abutting a planned street parcel that the grantor also owned, but the street was never dedicated, the deed conveyed to the owners the interest that the grantor held in the road since there was no clear expression of a contrary intent. 1845 La Dawn Lane, LLC v. Bowman, 277 Ga. 741, 594 S.E.2d 373 (2004).

In an action to invalidate an allegedly forged quitclaim deed filed by a husband, which transferred an interest in certain property to the husband's wife, summary judgment was erroneously granted to the husband, as a bankruptcy trustee presented sufficient evidence of disputed issues of material fact concerning the husband's equitable claim; hence, the matter was remanded for further proceedings under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq. Hurst v. Evans, 284 Ga. App. 274, 643 S.E.2d 824 (2007).

Title did not ripen under tax deed. — In a quiet title action under O.C.G.A. § 23-3-60, although a corporation with a 1984 tax deed to the property in dispute claimed that ripening of title had occurred under O.C.G.A. § 48-4-48 as the corporation held the tax deed for the required seven-year period under a former version of the statute, a 1989 amendment that applied expressly to tax deeds executed prior to July 1, 1989, required adverse possession by the tax deed grantee in order for title to ripen. BX Corp. v. Hickory Hill 1185, LLC, 285 Ga. 5, 673 S.E.2d 205 (2009).

Consent judgment inappropriate over waterfront property. — As both parties did not actually consent to all of the terms of a consent judgment which purported to resolve the parties' ongoing dispute over title to waterfront property in an action under O.C.G.A. § 23-3-60, a trial court erred in issuing the consent judgment; the trial court's consent judgment impermissibly modified a condition precedent to the parties' agreement. Allen v. Sea Gardens Seafood, Inc., 290 Ga. 715, 723 S.E.2d 669 (2012).

Action must be brought in county where land lies. — Trial court erred by dismissing a credit union's quiet title action because the two causes of action at issue were neither identical nor did they resolve the same issues as the quiet title action sought to establish the credit union as the legal title holder of the Lee County, Georgia, properties, while the Dougherty County lawsuit sought to hold the credit union monetarily responsible for the allegedly unlawful acquiring of the titles to those and other properties. DOCO Credit Union v. Chambers, 330 Ga. App. 633, 768 S.E.2d 808 (2015).

Res judicata. — Trial court did not err in ruling that a church's prior quia timet action under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq., barred an heir's action against the church seeking title to the property because the prior action settled the church's ownership interest in the property. Cartwright v. First Baptist Church of Keysville, Inc., 316 Ga. App. 299, 728 S.E.2d 893 (2012).

Dismissal of homeowner's claim based on assignment of security deed. — Homeowner's action to quiet title against an assignee of the security deed to the homeowner's property failed to state a claim upon which relief could be granted because the homeowner's security deed had been granted to the Mortgage Electronic Registration Systems, Inc. (MERS) and then to the assignee and was never held by the lender that had since become defunct. Bank of America, N.A. v. Johnson, 299 Ga. 861, 792 S.E.2d 704 (2016).

Cited in Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979); Henson v. Tucker, 278 Ga. App. 859, 630 S.E.2d 64 (2006); Thompson v. Cent. of Ga. R.R., 282 Ga. 264, 646 S.E.2d 669 (2007); Donald Azar, Inc. v. Muche, 326 Ga. App. 726, 755 S.E.2d 266 (2014).

RESEARCH REFERENCES

ALR. — Tax deed and recitals therein as evidence of regularity of tax proceedings as to advertising and notice of sale, and as to time, manner, and place of sale, 30 A.L.R. 8; 88 A.L.R. 264.

23-3-61. Who may bring proceeding.

Any person, which term shall include a corporation, partnership, or other association, who claims an estate of freehold present or future or any estate for years of which at least five years are unexpired, including persons holding lands under tax deeds, in any land in this state, whether in the actual and peaceable possession thereof or not and whether the land is vacant or not, may bring a proceeding in rem against all the world to establish his title to the land and to determine all adverse claims thereto or to remove any particular cloud or clouds upon his title to the land, including an equity of redemption, which proceeding may be against all persons known or unknown who claim or might claim adversely to him, whether or not the petition discloses any known or possible claimants.

History. — Ga. L. 1966, p. 443, § 1.

Law reviews. — For article, "Tracing Georgia's English Common Law Equity Jurisprudential Roots: Quia Timet," see 14 The Journal of Southern Legal History 135 (2006).

JUDICIAL DECISIONS

Legislative intent. — This section creates an efficient, speedy, and effective means of adjudicating disputed title claims and was intended by the General Assembly to serve as an additional remedy to other legal and equitable actions. Heath v. Stinson, 238 Ga. 364, 233 S.E.2d 178 (1977).

A plaintiff in an action to quiet title must assert that he holds some current record title or current prescriptive title, and not only an expectancy, in order to maintain his suit. In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979); Smith v. Georgia Kaolin Co., 264 Ga. 755, 449 S.E.2d 85 (1994), appeal dismissed, 269 Ga. 475, 498 S.E.2d 266 (1998).

Plaintiff in the action to quiet title failed to bring itself within the language of this section where it showed no current claim to an estate of freehold nor an estate of years. In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979).

Dismissal of quiet title claim improper. — Trial court erred in dismissing the property owner's quiet title claim because, although the bank tried to reform the deed and void the foreclosure that listed 2253 Dawnville as the property foreclosed upon, and the bank's counsel filed an affidavit of title that the bank intended the deed to encumber 2215 Dawnville, the allegations of the property owner's counterclaim disclosed that the property owner would be entitled to relief if it was determined that the property owner did in fact hold unencumbered legal title to 2215 Dawnville, and that the bank through the filing of the affidavits of title and the foreclosure and resulting deed under power, cast a cloud upon that title. Cronan v. JP Morgan Chase Bank, N.A., 336 Ga. App. 201, 784 S.E.2d 57 (2016).

Dismissal of homeowner's claim based on assignment of security deed. — Homeowner's action to quiet title against an assignee of the security deed to the homeowner's property failed to state a claim upon which relief could be granted

because the homeowner's security deed had been granted to the Mortgage Electronic Registration Systems, Inc. (MERS) and then to the assignee and was never held by the lender that had since become defunct. Bank of America, N.A. v. Johnson, 299 Ga. 861, 792 S.E.2d 704 (2016).

Proof of title. — The Quiet Title Act, O.C.G.A. § 23-3-60 et seq., does not require the same proof of title as an ejectment action. Smith v. Georgia Kaolin Co., 264 Ga. 755, 449 S.E.2d 85 (1994), appeal dismissed, 269 Ga. 475, 498 S.E.2d 266 (1998).

Evidence sufficient to support plaintiff's boundaries. — In a boundary line dispute filed pursuant to O.C.G.A. § 23-3-61, the trial court properly entered judgment on a jury verdict in favor of the plaintiffs, two landowners, and against their neighbor, and then denied the neighbor a new trial, or alternatively a judgment notwithstanding the verdict, as: (1) the boundary line indicated on a plat reflecting the locations of monuments on the parcel owned by two landowners complied with the monuments referenced in the original warranty deed; and (2) the neighbor agreed to a special verdict form allowing the jury to find that the plat submitted by the two landowners accurately and sufficiently showed the true boundary line. Dover v. Higgins, 287 Ga. App. 861, 652 S.E.2d 829 (2007), cert. denied, No. S08C0402, 2008 Ga. LEXIS 237 (Ga. 2008).

All known heirs not required parties. — Action brought by decedent's grandson to quiet title to real property was not subject to dismissal for failure to join all the known heirs of the decedent. Resseau v. Bland, 268 Ga. 634, 491 S.E.2d 809 (1997).

Easement insufficient to support claim. — A homeowner's association was not entitled to bring a quiet title action against a subdivision developer; the association's allegations that the developer should convey future title and that the association had an easement were insufficient to support a claim for quiet title, as a petition to quiet title could not depend upon an easement. Dykes Paving & Constr. Co. v. Hawk's Landing Homeowners Ass'n, 282 Ga. 305, 647 S.E.2d 579 (2007).

Res judicata. — Trial court did not err in ruling that a church's prior quia timet action under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq., barred an heir's action against the church seeking title to the property because the prior action settled the church's ownership interest in the property. Cartwright v. First Baptist Church of Keysville, Inc., 316 Ga. App. 299, 728 S.E.2d 893 (2012).

Cited in Pittard v. McMillon, 225 Ga. 239, 167 S.E.2d 644 (1969); McGee v. Craig, 230 Ga. 553, 198 S.E.2d 165 (1973); Gauker v. Eubanks, 230 Ga. 893, 199 S.E.2d 771 (1973); James v. Gainey, 231 Ga. 543, 203 S.E.2d 163 (1974); Rockmart Bank v. Dister, 233 Ga. 748, 213 S.E.2d 645 (1975); Williams v. Mathis, 237 Ga. 305, 227 S.E.2d 378 (1976); Burruss v. Bailey, 238 Ga. 72, 230 S.E.2d 878 (1976); Selby v. Gilmer, 240 Ga. 241, 240 S.E.2d 80 (1977); Peacock v. Nat'l Bank & Trust Co., 241 Ga. 280, 244 S.E.2d 816 (1978); Ferguson v. Golf Course Consultants, Inc., 243 Ga. 112, 252 S.E.2d 907 (1979); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); Thompson v. Cheatham, 244 Ga. 117, 259 S.E.2d 62 (1979); Wiggins v. Southern Bell Tel. & Tel. Co., 245 Ga. 526, 266 S.E.2d 148 (1980); Flaum v. Middlebury, Inc., 246 Ga. 682, 272 S.E.2d 695 (1980); Cole v. Thrasher, 246 Ga. 683, 272 S.E.2d 696 (1980); Cooley v. All The World, 247 Ga. 459, 276 S.E.2d 615 (1981); Lindsey v. Lindsey, 249 Ga. 832, 294 S.E.2d 512 (1982); Holden v. State, 187 Ga. App. 597, 370 S.E.2d 847 (1988); Norton v. Holcomb, 285 Ga. App. 78, 646 S.E.2d 94 (2007); Republic Title Company, LLC v. Freeport Title and Guaranty, Inc., 351 Ga. App. 408, 829 S.E.2d 172 (2019).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Actions, § 41. 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, § 6.

C.J.S. — 30 C.J.S., Equity, § 102.

ALR. — Doctrine of after-acquired title as between one who took before and one who took after common grantor or mortgagor acquired title, 25 A.L.R. 83.

Tax deed and recitals therein as evidence of regularity of tax proceedings as to advertising and notice of sale, and as to time, manner, and place of sale, 30 A.L.R. 8; 88 A.L.R. 264.

Return of payments as condition of cancellation of land contract as cloud on title, 35 A.L.R. 274.

Right of one not in possession to maintain suit to remove cloud on title in case of fraud, 36 A.L.R. 698.

Judgment (or final order) affecting title or interest in real property as subject to collateral attack because of insufficiency of description in the pleadings, 111 A.L.R. 1200.

Suit to determine ownership, or protect rights, in respect of instruments not physically within the state but relating to real estate therein as one in rem or quasi in rem, jurisdiction of which may rest upon constructive service, 161 A.L.R. 1073.

Constitutionality of a statute which, regardless of possession by the owner, reduces title to real estate to a mere right of action to be asserted within a prescribed period of time, 7 A.L.R.2d 1366.

Marketability of title derived from or through, or affected by possible claim of, infant, 24 A.L.R.2d 1306.

Maintainability, by lessee, of action to quiet title to leasehold, 51 A.L.R.2d 1227.

Common source of title doctrine, 5 A.L.R.3d 375.

Use of property by public as affecting acquisition of title by adverse possession, 56 A.L.R.3d 1182.

23-3-62. Venue; contents, verification and filing of petition; filing in lis pendens docket.

(a) The proceeding in rem shall be instituted by filing a petition in the superior court of the county in which the land is situated.

(b) The petition shall be verified by the petitioner and shall contain a particular description of the land to be involved in the proceeding, a specification of the petitioner's interest in the land, a statement as to whether the interest is based upon a written instrument (whether same be a contract, deed, will, or otherwise) or adverse possession or both, a description of all adverse claims of which petitioner has actual or constructive notice, the names and addresses, so far as known to the petitioner, of any possible adverse claimant, and, if the proceeding is brought to remove a particular cloud or clouds, a statement as to the grounds upon which it is sought to remove the cloud or clouds.

(c) With the petition there shall be filed (1) a plat of survey of the land, (2) a copy of the immediate instrument or instruments, if any, upon which the petitioner's interest is based, and (3) a copy of the immediate instrument or instruments of record or otherwise known to the petitioner, if any, upon which any person might base an interest in the land adverse to the petitioner.

(d) Upon the filing of the petition, the petitioner shall contemporaneously file with the clerk of the court a notice for record in the lis pendens docket pursuant to Code Sections 44-14-610 through 44-14-613.

History. — Ga. L. 1966, p. 443, § 2.

Law reviews. — For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the

resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

JUDICIAL DECISIONS

Tax sale of property proper. — In a purchaser's quiet title action against the executor of a testatrix's estate, the trial court did not err in adopting the report of a special master and in decreeing that fee simple title to the land was vested in the purchaser because the purchaser acquired title to the property by virtue of a tax sale and deed, which was conducted in accordance with O.C.G.A. § 48-4-1 et seq.; a title search showed the testatrix's nephew as holding record title to the property, but out of caution, both the nephew and the executor were served with notice of the tax sale, the tax commissioner met with the executor prior to the sale and offered to accept payment for the back taxes, but the executor failed to do so, and the property was sold to the purchaser, with the overage going to the nephew, and the executor did not timely seek to exercise a right of redemption under O.C.G.A. § 48-4-40. Mann v. Blalock, 286 Ga. 541, 690 S.E.2d 375 (2010).

Quiet title proceeding procedurally deficient. — In a purchaser's quiet title action against the executor of a testatrix's estate, the trial court did not err in adopting the report of a special master and in decreeing that fee simple title to the land was vested in the purchaser because the trial court was authorized to find that the executor's prior quiet title action failed to convey any interest in the property to the executor and to decree that the judgment entered in that action be removed as a cloud upon the purchaser's title when the prior quiet title proceeding was procedurally deficient; the quiet title petition was not verified as required by O.C.G.A. § 23-3-62(b), it did not include a plat of survey of the land as required by § 23-3-62(c), a lis pendens was not filed contemporaneously with the filing of the petition as required by § 23-3-62(d), the petition was not submitted to an authorized special master as required by O.C.G.A. § 23-3-63, and the record failed to establish service on any party as required by O.C.G.A. § 23-3-65(b). Mann v. Blalock, 286 Ga. 541, 690 S.E.2d 375 (2010).

Owner had granted deeds to secure debt had no legal title to property. — In a borrower's quiet title action against two lenders, the documents attached to the complaint and answer reflected that the borrower had granted two deeds to secure debt to the lenders, and the borrower therefore did not have legal title to the property absent evidence that the borrower had satisfied the debts; therefore, dismissal of the borrower's petition under O.C.G.A. § 23-3-62 was proper. The trial court was not required to refer the case to a special master prior to dismissal for failure to state a claim. Montia v. First-Citizens Bank & Trust Co., 341 Ga. App. 867, 801 S.E.2d 907 (2017).

Evidence did not establish rightful owner of property. — Trial court erred in finding that a neighbor was the rightful owner of certain property because there was no evidence to support the conclusion that the neighbor owned the disputed property either by deed or by adverse possession; the legal description of the property contained in the neighbor's deed did not include the disputed property, and since the evidence showed that, at most, the neighbor made a claim to the disputed property for only eighteen years before being challenged by the landowners, the neighbor's claim to have gained prescriptive title to the property through adverse possession under O.C.G.A. §§ 44-5-161 and 44-5-165 failed as a matter of law. Washington v. Brown, 290 Ga. 477, 722 S.E.2d 65 (2012).

Evidence supported the trial court's conclusion that landowners did not own the disputed property because the landowners' occasional maintenance and use of the disputed property did not amount to the type of exclusive possession for 20 years that would support a claim for prescriptive title under O.C.G.A. §§ 44-5-161 and 44-5-165. Washington v. Brown, 290 Ga. 477, 722 S.E.2d 65 (2012).

Cited in Selby v. Gilmer, 240 Ga. 241, 240 S.E.2d 80 (1977); Middleton v. Robin-

son, 241 Ga. 174, 244 S.E.2d 7 (1978); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979); Smith v. Georgia Kaolin Co., 264 Ga. 755, 449 S.E.2d 85 (1994); Woelper v. Piedmont Cotton Mills, Inc., 266 Ga. 472, 467 S.E.2d 517 (1996); Resseau v. Bland, 268 Ga. 634, 491 S.E.2d 809 (1997).

RESEARCH REFERENCES

ALR. — Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 A.L.R. 306.

Right of one not in possession to maintain suit to remove cloud on title in case of fraud, 36 A.L.R. 698.

Right to secure new or successive notice of lis pendens in same or new action after loss or cancellation of original notice, 52 A.L.R.2d 1308.

23-3-63. Submission to special master.

The court, upon receipt of the petition together with the plat and instruments filed therewith, shall submit the same to a special master who shall be a person who is authorized to practice law in this state and is a resident of the judicial circuit wherein the action is brought.

History. — Ga. L. 1966, p. 443, § 3.

Law reviews. — For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

JUDICIAL DECISIONS

Default improper if no special master appointed. — Default judgment against owners in a quiet title action based on their failure to answer was improper because, once the in rem proceeding was instituted, the trial court was required, pursuant to O.C.G.A. § 23-3-63, to submit the matter to a special master, and a special master was never appointed such that service could have properly been completed pursuant to the Quiet Title Act, O.C.G.A. § 23-3-60 et seq.; since the Quiet Title Act provided specific rules of practice and procedure with respect to an in rem quiet title action against all the world, the Civil Practice Act, O.C.G.A. § 9-11-1 et. seq., was inapplicable. Woodruff v. Morgan County, 284 Ga. 651, 670 S.E.2d 415 (2008).

Appointment of special master required. — In a quiet title action, the trial court erred by failing to appoint a special master because Georgia's Quiet Title Act, O.C.G.A. § 23-3-60 et seq., requires a trial court to appoint a special master and for that special master to make a report of the special master's findings to the trial court. DOCO Credit Union v. Chambers, 330 Ga. App. 633, 768 S.E.2d 808 (2015).

Quiet title proceeding procedurally deficient. — In a purchaser's quiet title action against the executor of a testatrix's estate, the trial court did not err in adopting the report of a special master and in decreeing that fee simple title to the land was vested in the purchaser because the trial court was authorized to find that the executor's prior quiet title action failed to convey any interest in the property to the executor and to decree that the judgment entered in that action be removed as a cloud upon the purchaser's title when the prior quiet title proceeding was procedurally deficient; the quiet title petition was not verified as required by O.C.G.A. § 23-3-62(b), it did not include a plat of survey of the land as required by § 23-3-62(c), a lis pendens was not filed contemporaneously with the filing of the petition as required by § 23-3-62(d), the petition was not submitted to an authorized special master as required by

O.C.G.A. § 23-3-63, and the record failed to establish service on any party as required by O.C.G.A. § 23-3-65(b). Mann v. Blalock, 286 Ga. 541, 690 S.E.2d 375 (2010).

Dismissal for failure to state a claim with submission to special master. — In a borrower's quiet title action against two lenders, the documents attached to the complaint and answer reflected that the borrower had granted two deeds to secure debt to the lenders, and the borrower therefore did not have legal title to the property absent evidence that the borrower had satisfied the debts; therefore, dismissal of the borrower's petition under O.C.G.A. § 23-3-62 was proper. The trial court was not required to refer the case to a special master prior to dismissal for failure to state a claim. Montia v. First-Citizens Bank & Trust Co., 341 Ga. App. 867, 801 S.E.2d 907 (2017).

Payment of special master's fees not prerequisite to appeal. — Provisions of O.C.G.A. § 9-7-22(c) requiring the payment of auditors' fees prior to the filing of an appeal did not apply to special masters appointed under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq., pursuant to O.C.G.A. §§ 23-3-43 and 23-3-63, and an appeal was not dismissed due to failure to pay the special master's fees. Davis v. Harpagon Co., LLC, 300 Ga. App. 644, 686 S.E.2d 259 (2009) was overruled to the extent it was to the contrary. Nix v. 230 Kirkwood Homes, LLC, 300 Ga. 91, 793 S.E.2d 402 (2016).

Cited in Georgia, Ashburn, Sylvester & Camilla Ry. v. Johnson, 226 Ga. 358, 174 S.E.2d 895 (1970); McGee v. Craig, 230 Ga. 553, 198 S.E.2d 165 (1973); South DeKalb Family Branch of YMCA of Metro. Atlanta, Inc. v. Frazier, 236 Ga. 903, 225 S.E.2d 890 (1976); Thornton v. Reb Properties, Inc., 237 Ga. 59, 226 S.E.2d 741 (1976); Higdon v. Gates, 238 Ga. 105, 231 S.E.2d 345 (1976); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979); Walters v. McNeese, 257 Ga. 440, 360 S.E.2d 268 (1987); DRST Holdings, Ltd. v. Agio Corp., 282 Ga. 903, 655 S.E.2d 586 (2008); Whipple v. Hatcher, 283 Ga. 309, 658 S.E.2d 585 (2008); Rhymes v. E. Atlanta Church of God, Inc., 284 Ga. 145, 663 S.E.2d 670 (2008); Keever v. Dellinger, 291 Ga. 860, 734 S.E.2d 874 (2012); Wyatt v. Hizer, 337 Ga. App. 767, 788 S.E.2d 866 (2016); Republic Title Company, LLC v. Freeport Title and Guaranty, Inc., 351 Ga. App. 408, 829 S.E.2d 172 (2019); Tyner v. Edge, 355 Ga. App. 196, 843 S.E.2d 632 (2020).

23-3-64. Other required evidence.

The master shall examine the petition, plat, and all documents filed therewith and may require other evidence to be filed, including, but not limited to, an abstract of title.

History. — Ga. L. 1966, p. 443, § 4.

JUDICIAL DECISIONS

Cited in Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979); Meadows v. Barker, 241 Ga. App. 753, 526 S.E.2d 643 (1999); Cernonok v. Kane, 280 Ga. 272, 627 S.E.2d 14 (2006).

23-3-65. Notice; process; service by publication; filing of adverse pleading; appointment of disinterested representative.

(a) Upon the filing of all evidence with him, the master shall:

(1) Determine who is entitled to notice, including, but not limited to, all adjacent landowners and all adverse claimants as to whose adverse claims petitioner has actual or constructive notice;

(2) Cause process to issue, directed to all persons who are entitled to notice and to all other persons whom it may concern.

(b) Process shall be served upon known persons whose residence is ascertainable by the sheriff or his deputy as provided by law. In all cases where service by publication is permitted under the laws and where the respondent or other party resides outside this state or whose residence is unknown and it is necessary to perfect service upon such person by publication, upon the fact being made to appear to the judge or clerk of the court in which the action is pending, the judge or clerk may order service to be perfected by publication in the paper in which sheriffs' advertisements are printed, four times within the ensuing 30 days, publications to be weekly. The published notice shall contain the name of the petitioner and respondent with a caption setting forth the court, the character of the action, the date the action was filed, the date of the order for service by publication, and a notice directed and addressed to the party to be thus served, commanding him to be and appear at the court in which the action is pending within 30 days of the date of the order for service by publication, and shall bear teste in the name of the judge and shall be signed by the clerk of the court. The date upon which the nonresident or party whose residence is unknown is called upon to appear shall be the appearance day of the case.

(c) Any adverse party shall be entitled to have at least 30 days after completion of service to file any pleading he desires in the matter before the court.

(d) If, upon the filing of the petition or of the evidence required by him, the master finds that there are persons under a disability, or minors, or persons not in being, unascertained, or unknown who may have an interest, he shall appoint a disinterested person, in the nature of a guardian ad litem, who shall be served with copies of the notice prescribed and who shall represent these interests.

History. — Ga. L. 1966, p. 443, § 5.

JUDICIAL DECISIONS

Service by publication not authorized. — Service on lender by publication was not authorized by O.C.G.A. § 23-3-65(b), nor did it comport with due process, where it did not appear that an attempt to locate the lender would have been fruitless, since there were obvious channels of information available. Floyd v. Gore, 251 Ga. App. 803, 555 S.E.2d 170 (2001).

Purchasers, who bought the subject property at a tax sale, failed to pursue the obvious and fruitful channels of information that would have allowed the purchasers to ascertain the property owners' current address with minimal effort and

effect personal service and, thus, service by publication of the purchasers' action to quiet title did not meet the constitutional requirements of due process. Dukes v. Munoz, 346 Ga. App. 319, 816 S.E.2d 164 (2018).

Quiet title proceeding procedurally deficient and demonstrated failure to serve. — In a purchaser's quiet title action against the executor of a testatrix's estate, the trial court did not err in adopting the report of a special master and in decreeing that fee simple title to the land was vested in the purchaser because the trial court was authorized to find that the executor's prior quiet title action failed to convey any interest in the property to the executor and to decree that the judgment entered in that action be removed as a cloud upon the purchaser's title when the prior quiet title proceeding was procedurally deficient; the quiet title petition was not verified as required by O.C.G.A. § 23-3-62(b), it did not include a plat of survey of the land as required by § 23-3-62(c), a lis pendens was not filed contemporaneously with the filing of the petition as required by § 23-3-62(d), the petition was not submitted to an authorized special master as required by O.C.G.A. § 23-3-63, and the record failed to establish service on any party as required by O.C.G.A. § 23-3-65(b). Mann v. Blalock, 286 Ga. 541, 690 S.E.2d 375 (2010).

Special master not appointed therefore no service. — Default judgment against owners in a quiet title action based on their failure to answer was improper because, once the in rem proceeding was instituted, the trial court was required, pursuant to O.C.G.A. § 23-3-63, to submit the matter to a special master, and a special master was never appointed such that service could have properly been completed pursuant to the Quiet Title Act, O.C.G.A. § 23-3-60 et seq.; since the Quiet Title Act provided specific rules of practice and procedure with respect to an in rem quiet title action against all the world, the Civil Practice Act, O.C.G.A. § 9-11-1 et. seq., was inapplicable. Woodruff v. Morgan County, 284 Ga. 651, 670 S.E.2d 415 (2008).

Trial court erred to the extent that the court concluded that the defendants, a homeowners association and one of the association's members, were in default because proper service had not yet occurred as under O.C.G.A. § 23-3-65 a special master would need to determine who was entitled to notice and cause process to issue with respect to the quiet title claim against all the world and it was undisputed that at the time of the default judgment order this procedure had not yet been completed and, therefore, the defendants were not yet required to answer the complaint. Richards v. Bose, 354 Ga. App. 801, 841 S.E.2d 78 (2020).

Standing. — In a quiet title action brought by a homeowner with regard to a road, a developer and a county did not lack standing as possible adverse claimants. The county had a direct interest in the proceeding because the owner of the subdivision where the homeowner lived had expressly dedicated all streets delineated in the recorded subdivision plat, including the road in question, to public use; the developer also had a stake in the outcome of the case because of the developer's interest in paving the remainder of the road to provide access to the developer's new development. Harbuck v. Houston County, 284 Ga. 4, 662 S.E.2d 107, cert. denied, 129 S. Ct. 641, 172 L.Ed.2d 613 (2008).

Cited in Pittard v. McMillon, 225 Ga. 239, 167 S.E.2d 644 (1969); Barrett v. Simmons, 235 Ga. 600, 221 S.E.2d 25 (1975); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979); Resseau v. Bland, 268 Ga. 634, 491 S.E.2d 809 (1997); Brown v. Fokes Props. 2002, Inc., 283 Ga. 231, 657 S.E.2d 820 (2008); Brown v. Fokes Props. 2002, Inc., 283 Ga. 231, 657 S.E.2d 820 (2008).

RESEARCH REFERENCES

ALR. — Right to secure new or successive notice of lis pendens in same or new action after loss or cancellation of original notice, 52 A.L.R.2d 1308.

23-3-66. Jurisdiction of special master; trial by jury.

Upon reasonable notice to the parties, after proof of serving notice as required by this article has been filed and after the appointment of the disinterested person as representative where required, the special master shall have complete jurisdiction within the scope of the pleadings to ascertain and determine the validity, nature, or extent of petitioner's title and all other interests in the land, or any part thereof, which may be adverse to the title claimed by the petitioner, or to remove any particular cloud or clouds upon the title to the land and to make a report of his findings to the judge of the court; provided, however, any party to this proceeding may demand a trial by a jury of any question of fact; provided, further, that the master on his own initiative may require a trial by a jury of any question of fact.

History. — Ga. L. 1966, p. 443, § 6.

Law reviews. — For article surveying development of equity and the right to trial by jury in equity actions in Georgia, and advocating use of jury to try issues of fact in equitable actions, see 8 Mercer L. Rev. 225 (1957). For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010). For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

JUDICIAL DECISIONS

Demand for jury trial must be filed prior to ruling by special master. — In proceedings to remove a cloud on title, a demand for a jury trial cannot be filed after the special master has ruled on the questions of law and fact in the case and submitted his report to the trial court. The judgment entered by the trial court is thus a final judgment to which a notice of appeal must be filed within 30 days. Thornton v. Reb Properties, Inc., 237 Ga. 59, 226 S.E.2d 741 (1976); Higdon v. Gates, 238 Ga. 105, 231 S.E.2d 345 (1976).

This section requires counsel to demand a jury trial for the resolution of any factual issues in the case prior to the time it is heard by the special master. If no demand is filed prior to the time he hears the case, the special master is the arbiter of law and fact and decides all issues in the case unless the master on his own initiative requires a trial by jury of any question of fact. Thornton v. Reb Properties, Inc., 237 Ga. 59, 226 S.E.2d 741 (1976).

When a demand for a jury trial was filed before the case was heard by a special master, the trial court did not err in vacating the court's initial order adopting the special master's report and correctly ordered that a jury trial be held. Addison v. Reece, 263 Ga. 631, 436 S.E.2d 663 (1993).

Because the defendant demanded a jury trial after the start of the hearing in front of a special master, the superior court did not err in approving and adopting the special master's order denying as untimely the defendant's demand. Griffeth v. Griffin, 245 Ga. App. 619, 538 S.E.2d 521 (2000).

When, in a dispute over the ownership of a parcel of land between a landowner and a railroad, the landowner timely demanded a jury trial before the special master to which the case was referred ruled, it had to be decided whether there was a genuine issue of material fact for a jury to decide, and, because the railroad did not show actual or constructive possession of the disputed land as a matter of law, there was such an issue, and it was error for the trial court to deny the landowner's request for a jury. Watkins v. Hartwell R.R. Co., 278 Ga. 42, 597 S.E.2d 377 (2004).

In a suit between a church and a min-

ister, the trial court's order striking a portion of the minister's complaint was not a final adjudication of all claims, thereby entitling the minister to appeal. It was only a determination that the minister had waived the right to a jury trial under O.C.G.A. § 23-3-66 by not filing a jury demand before a hearing was held by a special master, and not that any of the claims themselves had been waived or otherwise disposed of. Rhymes v. E. Atlanta Church of God, Inc., 284 Ga. 145, 663 S.E.2d 670 (2008).

In a quiet title action, a party's attorney presented a jury demand at the special master's hearing and in the superior court hearing stating that the action was filed prior to the special master's hearing, and no evidence to the contrary was offered; under O.C.G.A. § 23-3-66, therefore, a jury trial was required on issues of fact. Wyatt v. Hizer, 337 Ga. App. 767, 788 S.E.2d 866 (2016).

Claims outside of special master's jurisdiction not waived. — Under O.C.G.A. § 23-3-66, a special master had jurisdiction only over a church's quiet title petition, not its other claims against a minister alleging conversion of personal property and money. Therefore, the church did not waive those other claims by not raising them before the master. Rhymes v. E. Atlanta Church of God, Inc., 284 Ga. 145, 663 S.E.2d 670 (2008).

Dismissal for failure to state claim with submission to special master. — In a borrower's quiet title action against two lenders, the documents attached to the complaint and answer reflected that the borrower had granted two deeds to secure debt to the lenders, and the borrower therefore did not have legal title to the property absent evidence that the borrower had satisfied the debts; therefore, dismissal of the borrower's petition under O.C.G.A. § 23-3-62 was proper. The trial court was not required to refer the case to a special master prior to dismissal for failure to state a claim. Montia v. First-Citizens Bank & Trust Co., 341 Ga. App. 867, 801 S.E.2d 907 (2017).

Failure to provide jury trial not error. — Since a special master found no question of fact to exist and the owners did not make present the existence of a question of fact on appeal, the failure to provide a jury trial pursuant to O.C.G.A. § 23-3-66, even if timely requested, was not error. Sacks v. Martin, 284 Ga. 712, 670 S.E.2d 417 (2008).

In a property owner's quiet title action against a tax sale buyer, the owner was not entitled to a jury trial; even assuming that the action was quia timet against all the world, the owner failed to demonstrate an issue of fact requiring jury resolution. Mancuso v. TDGA, LLC, 301 Ga. 671, 802 S.E.2d 248 (2017), cert. denied, 200 L. Ed. 2d 518, 86 U.S.L.W. 3485 (U.S. 2018), cert. denied, 2018 U.S. LEXIS 2010, 200 L. Ed. 2d 518 (U.S. 2018).

Appointment of special master required. — In a quiet title action, the trial court erred by failing to appoint a special master because Georgia's Quiet Title Act, O.C.G.A. § 23-3-60 et seq., requires a trial court to appoint a special master and for that special master to make a report of the special master's findings to the trial court. DOCO Credit Union v. Chambers, 330 Ga. App. 633, 768 S.E.2d 808 (2015).

Authority of special master and judge. — In a quiet title action, there was no merit to the contention that only the special master had jurisdiction to rule upon a motion for summary judgment. In submitting a quiet title case to a special master, a trial court did not cede jurisdiction to render a final decision; O.C.G.A. § 23-3-67 gave only the trial court authority to issue the final decree. Harbuck v. Houston County, 284 Ga. 4, 662 S.E.2d 107, cert. denied, 129 S. Ct. 641, 172 L.Ed.2d 613 (2008).

Special master, in accordance with the special master's complete jurisdiction under O.C.G.A. § 23-3-66, was entitled to review the pleadings and evidence to determine the valid interests in real property because an amended pleading properly filed by a bank included claims that a grantee's foreclosure sale was improper and that title under the grantee's security deed had reverted to a promisor pursuant to O.C.G.A. § 44-14-80(a)(1). MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485 (2011).

In submitting a quiet title case to the special master, the trial court did not cede jurisdiction to render a final decision as

although the trial court was not required to hear exceptions to the special master's report, the trial court had to independently evaluate the correctness of the report before adopting the report as a judgment and it was the trial court, not the special master, who ordered disbursement of excess funds following the tax sale. Republic Title Company, LLC v. Freeport Title and Guaranty, Inc., 351 Ga. App. 408, 829 S.E.2d 172 (2019), cert. denied, No. S19C1616, 2020 Ga. LEXIS 168 (Ga. 2020).

Master's authority to set deadlines. — In a quiet title action that was referred to a special master, the master's setting of a deadline for the parties to file motions to disqualify did not violate any statute or rule, Ga. Unif. Super. Ct. R. 25.3, nor did the setting of the deadline prevent the special master from fulfilling the master's separate obligation to ensure that the master was impartial and disinterested. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Demand for jury trial must be filed prior to special master hearing the case. — Although landowners who were defending a prescriptive easement suit by quia timet had the right to demand a jury trial of any question of fact, pursuant to O.C.G.A. § 23-3-66, when the landowners failed to file a jury demand before the special master heard the case, the special master became the arbiter of law and fact. McGregor v. River Pond Farm, LLC, 312 Ga. App. 652, 719 S.E.2d 546 (2011).

Quiet title action within special master jurisdiction. — It was not error for the trial court to adopt the special master's conclusion that title to certain property was vested in a landowner's neighbor because the neighbor's quitclaim deed was the only deed placed before the special master that described an interest in the subject property. Bailey v. Moten, 289 Ga. 897, 717 S.E.2d 205 (2011).

Report of findings to judge. — Provision in O.C.G.A. § 23-3-66 that the special master make a report of findings to the judge did not mandate a separate finding or conclusion as to each claim or defense in taxpayers' claim against an assignee of a purchaser of their property at a tax sale. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

When a defendant who asserted a quiet title claim against the plaintiffs requested a special master, the trial court was required to submit the claim to a special master, and no notice or hearing on the matter was required; once submitted, the special master had complete jurisdiction to determine the quiet title claim. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Cited in Pittard v. McMillon, 225 Ga. 239, 167 S.E.2d 644 (1969); McGee v. Craig, 230 Ga. 553, 198 S.E.2d 165 (1973); Lawhorn v. Steele, 232 Ga. 857, 209 S.E.2d 191 (1974); Heath v. Stinson, 238 Ga. 364, 233 S.E.2d 178 (1977); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979); Duncan v. First Nat'l Bank, 597 F.2d 51 (5th Cir. 1979); Smith v. Georgia Kaolin Co., 264 Ga. 755, 449 S.E.2d 85 (1994); Martin v. Patton, 225 Ga. App. 157, 483 S.E.2d 614 (1997); Paul v. Keene, 272 Ga. 357, 529 S.E.2d 135 (2000); Proctor v. Heirs of Jernigan, 273 Ga. 29, 538 S.E.2d 36 (2000); Fort Mt. Container Corp. v. Keith, 275 Ga. 210, 563 S.E.2d 860 (2002); Steinichen v. Stancil, 281 Ga. 75, 635 S.E.2d 158 (2006); Bowen v. Laird, 348 Ga. App. 1, 821 S.E.2d 105 (2018).

RESEARCH REFERENCES

ALR. — Right to jury trial in suit to remove cloud, quiet title, or determine adverse claims, 117 A.L.R. 9.

23-3-67. Decree; effect of recordation.

Upon the receipt of the master's report or upon a jury verdict, the court shall issue a decree which shall be recorded in the office of the

clerk of the superior court of the county or counties wherein the land affected lies and which, when recorded, shall operate to bind the land affected according to the tenor thereof and shall be conclusive upon and against all persons named therein, known or unknown. A marginal reference to the recorded judgments and decree shall be entered upon any recorded instrument stated to be affected thereby.

History. — Ga. L. 1966, p. 443, § 7.

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Demand for jury trial deemed untimely unless filed prior to consideration by special master. — Where a petitioner fails to file a demand for a jury trial prior to the time the case is heard by a special master, the demand is considered untimely, and will be denied. Brown v. Wilson, 240 Ga. 856, 242 S.E.2d 603 (1978).

Court retained jurisdiction despite role of special master. — In a quiet title action, there was no merit to the contention that only the special master had jurisdiction to rule upon a motion for summary judgment. In submitting a quiet title case to a special master, a trial court did not cede jurisdiction to render a final decision; O.C.G.A. § 23-3-67 gave only the trial court authority to issue the final decree. Harbuck v. Houston County, 284 Ga. 4, 662 S.E.2d 107, cert. denied, 129 S. Ct. 641, 172 L.Ed.2d 613 (2008).

Appointment of special master required. — In a quiet title action, the trial court erred by failing to appoint a special master because Georgia's Quiet Title Act, O.C.G.A. § 23-3-60 et seq., requires a trial court to appoint a special master and for that special master to make a report of the special master's findings to the trial court. DOCO Credit Union v. Chambers, 330 Ga. App. 633, 768 S.E.2d 808 (2015).

Adoption of special master's report. — Trial court did not err by failing to grant an investment company's motion for an oral hearing on the company's exceptions to a special master's report because a trial court was entitled to enter judgment at any time the court chose and could have done so before any exceptions were filed by the company. Therefore, if a trial court may adopt the special master's report and enter judgment even before a party has a chance to file exceptions to the report, then it cannot be error for the trial court to fail to hold an oral hearing on any exceptions before entering judgment. MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485 (2011).

Dismissal for failure to describe land triggers res judicata in later action. — Where petition to quiet title was dismissed for failure to describe land, petitioner was barred by res judicata from instituting a subsequent action for declaratory and injunctive relief based on same facts; res judicata applies not only when case was decided on merits, but also when it could have been so decided, had the case been handled appropriately by the litigants in the original case. Piedmont Cotton Mills, Inc., v. Woelper, 269 Ga. 109, 498 S.E.2d 255 (1998).

Appellant did not waive objections. — Quiet title case was remanded to the trial court for it to address the merits of the appellant's motion for a new trial as the appellant's failure to file objections before the trial court adopted a special master's report did not bar the appellant from objecting to the trial court's judgment in a motion for new trial or on appeal since O.C.G.A. § 23-3-67 made no provision for filing exceptions to the special master's report and did not require a trial court to provide notice to the parties and to conduct a hearing before adopting the special master's report. Steinichen v. Stancil, 281 Ga. 75, 635 S.E.2d 158 (2006).

No provision for filing exceptions. — O.C.G.A. § 23-3-67 makes no provision for filing exceptions to a special master's report in a suit seeking to quiet title, and does not require a trial court to provide notice to the parties and to conduct a hearing before adopting a special master's

report; although a trial court is not required to hear exceptions to a special master's report, the trial court must independently evaluate the correctness of the report before adopting it as the judgment of the trial court. Steinichen v. Stancil, 281 Ga. 75, 635 S.E.2d 158 (2006).

Cited in Thornton v. Reb Properties, Inc., 237 Ga. 59, 226 S.E.2d 741 (1976); Heath v. Stinson, 238 Ga. 364, 233 S.E.2d 178 (1977); Glenn v. Allen, 239 Ga. 646, 238 S.E.2d 438 (1977); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979); Keever v. Dellinger, 291 Ga. 860, 734 S.E.2d 874 (2012).

23-3-68. Compensation of master and representative; taxing as part of costs.

The court shall fix a reasonable compensation, not less than $50.00, to be paid to the master appointed under this part and shall fix the compensation to be paid to any representative in the nature of a guardian ad litem appointed under this part. These fees are to be taxed in the discretion of the court as a part of the costs.

History. — Ga. L. 1966, p. 443, § 8.

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Award of compensation to the special master is a part of the costs and does not affect the finality of the judgment for purposes of appeal. Green v. Kaplan, 237 Ga. 602, 229 S.E.2d 369 (1976).

Jurisdiction to order special master fees. — Filing of a notice of appeal in the underlying action deprived a trial court of jurisdiction to thereafter order the payment of interim fees to a special master because ultimate responsibility for the fees was directly related to the resolution of the quiet title action that was not yet fully resolved at the time the trial court taxed the special master's fee as costs of the action. Under such circumstances, the award of the special master's fee was improper. Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130 (2011).

No hearing required. — O.C.G.A. § 23-3-68 did not require a hearing before the trial court as to the reasonableness of a special master's fees and costs; moreover, the trial court had discretion to apportion costs between the parties, and the allocation of costs was not controlled by which party prevailed. In part because taxpayers did not prevail on their claims against an assignee of the title to their property, the trial court did not err in assigning them 25 percent of the special master's fees. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Award of fees was not an abuse of discretion. — A trial court's order awarding a special master $9,500 in fees, to be borne equally by the parties in a quiet title/adverse possession case, was not an abuse of discretion. Simmons v. Cmty. Renewal & Redemption, LLC, 286 Ga. 6, 685 S.E.2d 75 (2009).

Cited in Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979); Bowen v. Laird, 348 Ga. App. 1, 821 S.E.2d 105 (2018); Republic Title Company, LLC v. Freeport Title and Guaranty, Inc., 351 Ga. App. 408, 829 S.E.2d 172 (2019).

23-3-69. Intervention after entering of decree.

At any time within 30 days from the entering of the final decree, any person not previously a party who claims an interest in the land may

intervene, in which event the case shall be reopened as to that party so that his rights may be adjudicated.

History. — Ga. L. 1966, p. 443, § 9.

JUDICIAL DECISIONS

Cited in Heath v. Stinson, 238 Ga. 364, 233 S.E.2d 178 (1977); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979); Fort Mt. Container Corp. v. Keith, 275 Ga. 210, 563 S.E.2d 860 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, § 71.

ALR. — Who may intervene in suit to quiet title, 170 A.L.R. 149.

23-3-70. Joinder.

(a) Two or more persons having separate and distinct parcels of land in the same county and holding under the same source of title or persons having separate and distinct interests in the same parcel or parcels may join in a petition under this part against the same supposed claimants.

(b) A petitioner may join separate causes of action in one petition; but, if they cannot be conveniently disposed of together, the court may order separate trials.

History. — Ga. L. 1966, p. 443, § 10.

JUDICIAL DECISIONS

Cited in Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, § 72.

23-3-71. Liberal construction.

This part shall be liberally construed.

History. — Ga. L. 1966, p. 443, § 12.

JUDICIAL DECISIONS

Cited in Heath v. Stinson, 238 Ga. 364, 233 S.E.2d 178 (1977); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979).

23-3-72. Remedy cumulative.

The remedy provided by this part is intended to be cumulative and not exclusive.

History. — Ga. L. 1966, p. 443, § 13.

JUDICIAL DECISIONS

Cited in Heath v. Stinson, 238 Ga. 364, 233 S.E.2d 178 (1977); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979).

23-3-73. Enforcement of article.

All municipalities, counties, and housing authorities shall have standing pursuant to this article.

History. — Code 1981, § 23-3-73, enacted by Ga. L. 2006, p. 39, § 18/HB 1313.

Editor's notes. — Ga. L. 2006, p. 39, § 1/HB 1313, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25/HB 1313, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

ARTICLE 4

EQUITABLE INTERPLEADER

Cross references. — Interpleader generally, § 9-11-22.

Law reviews. — For annual survey on insurance, see 61 Mercer L. Rev. 179 (2009).

23-3-90. Interpleader; when compelled; taxing of costs, attorney's fees.

(a) Whenever a person is possessed of property or funds or owes a debt or duty, to which more than one person lays claim of such a character as to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead.

(b) If the person bringing the action has to make or incur any expenses in so doing, including attorney's fees, the amount so incurred

shall be taxed in the bill of costs, under the approval of the court, the court in its discretion determining the amount of the attorney's fees, and shall be paid by the parties cast in the action as other costs are paid.

History. — Orig. Code 1863, § 3156; Code 1868, § 3168; Code 1873, § 3235; Code 1882, § 3235; Civil Code 1895, § 4896; Civil Code 1910, § 5471; Code 1933, § 37-1503; Ga. L. 1952, p. 90, § 1.

Law reviews. — For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
Requisites for Maintenance of Interpleader
1. Close Question of Law, Conflicting Claims, and Disinterested Stakeholder
2. Liability of Petitioner
3. Existence of Reasonable Danger or Doubt
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General Consideration

One objective of interpleader is avoiding double liability. — In order for a mere stakeholder to invoke the aid of a court of equity by interpleader, it is not necessary that suits actually be filed by all of the claimants, or that there will necessarily be double liability; one of the objects to be accomplished by interpleader is to avoid the danger of a double vexation against a single liability. Johnson v. Harbison-Walker Mining Co., 181 Ga. 630, 183 S.E. 791 (1936).

Cited in McKinney v. Daniels, 135 Ga. 157, 68 S.E. 1095 (1910); Fourth Nat'l Bank v. Lattimore, 168 Ga. 547, 148 S.E. 396 (1929); Bonner v. Merchants' Bank, 168 Ga. 782, 149 S.E. 133 (1929); Ewing v. Tanner, 184 Ga. 773, 193 S.E. 243 (1937); Freeman v. Atlanta Police Relief Ass'n, 62 Ga. App. 523, 8 S.E.2d 711 (1940); Finney v. Green, 90 Ga. App. 321, 83 S.E.2d 65 (1954); Morris v. Fulton County Fed. Sav. & Loan Ass'n, 211 Ga. 900, 89 S.E.2d 489 (1955); Fulton Nat'l Bank of Atlanta v. Block, 215 Ga. 602, 112 S.E.2d 616 (1960); Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); Adrian Lumber Co. v. Gillis, 219 Ga. 180, 132 S.E.2d 186 (1963); Russell v. Ware, 108 Ga. App. 628, 134 S.E.2d 48 (1963); Hudson v. Hudson, 220 Ga. 730, 141 S.E.2d 453 (1965); Algernon Blair, Inc. v. Trust Co., 224 Ga. 118, 160 S.E.2d 395 (1968); Adler v. Ormond, 117 Ga. App. 600, 161 S.E.2d 435 (1968); Sanders v. Carney, 224 Ga. 429, 162 S.E.2d 351 (1968); Gill v. Myrick, 228 Ga. 253, 185 S.E.2d 72 (1971); Leon Inv. Co. v. Independent Life & Accident Ins. Co., 123 Ga. App. 668, 182 S.E.2d 151 (1971); Williams v. Overstreet, 230 Ga. 112, 195 S.E.2d 906 (1973); Farris v. United States, 230 Ga. 862, 199 S.E.2d 782 (1973); C & S Land, Transp. & Dev. Corp. v. Grubbs, 141 Ga. App. 393, 233 S.E.2d 486 (1977); Blaylock v. Georgia Mut. Ins. Co., 239 Ga. 462, 238 S.E.2d 105 (1977); Paulding County v. City of Hiram, 240 Ga. 220, 240 S.E.2d 71 (1977); Johnson v. Mayor of Carrollton, 249 Ga. 173, 288 S.E.2d 565 (1982); Taylor v. Mosley, 252 Ga. 325, 314 S.E.2d 184 (1984); Evans v. Cushing Properties, 197 Ga. App. 380, 398 S.E.2d 306 (1990); McCalla, Raymer, Padrick, Cobb, Nichols & Clark v. C.I.T. Fin. Servs., Inc., 235 Ga. App. 95, 508 S.E.2d 471 (1998); Sanders v. Riley, 296 Ga. 693, 770 S.E.2d 570 (2015).

Requisites for Maintenance of Interpleader

1. Close Question of Law, Conflicting Claims, and Disinterested Stakeholder

Petition for interpleader requires existence of close question of law or fact. — A state depository having state funds on deposit when the state treasurer is suspended and another is appointed to the office pending the suspension may discharge its obligation to the state by accounting for the funds to the appointee, in such case an interpleader will not lie on behalf of the state depository to determine to whom it shall pay the money, whether to the suspended officer or to the appointee, because the law is clear that the appointee is entitled to receive the funds. Daniel v. Citizens & S. Nat'l Bank, 182 Ga. 384, 185 S.E. 696 (1936).

A bank which has rented a deposit box to which widow and administrator of deceased husband's estate claim right of entry need not decide at its peril either close questions of fact or nice questions of law; nevertheless, when it is in possession of all the facts and the questions of law are not intricate or debatable, a petition for interpleader will be denied. Mandeville v. First Nat'l Bank, 206 Ga. 426, 57 S.E.2d 553 (1950); Gunby v. Harper, 216 Ga. 94, 114 S.E.2d 856 (1960).

Before a claim will be held to be of such character as to render it doubtful or dangerous for the holder to act, there must be a close question of law or fact. Almand v. Reese, 209 Ga. 138, 71 S.E.2d 223 (1952).

Trial court properly granted relief sought by amended petition for interpleader and for certain injunctive relief against contractor and other named persons who had supplied him building material and performed labor for him in repairing a building which the petitioners owned, and who had instituted proceedings to foreclose liens against the repaired property. Bryant v. Haygood, 216 Ga. 561, 118 S.E.2d 469 (1961).

Concerning conflicting claims to a fund. — It is essential to the maintenance of a petition for interpleader that there be at least two persons, having conflicting claims, each apparently well founded, to a fund in the hands of a person having no interest in or claim thereon, and who, as between the conflicting claimants, is perfectly indifferent. Davis v. Davis, 96 Ga. 136, 21 S.E. 1002 (1895); Miller Hotel Co. v. Chastaine, 183 Ga. 172, 188 S.E. 4 (1936); Mullins v. Autry, 200 Ga. 645, 38 S.E.2d 390 (1946).

The general doctrine is, that interpleader lies, where two or more persons claim the same thing, under different titles, or in separate interests, from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the duty claimed, or to deliver the property claimed, is either molested by an action or actions brought against him, or fears he may suffer injury, from the conflicting claims of the parties against him. Johnson v. Harbison-Walker Mining Co., 181 Ga. 630, 183 S.E. 791 (1936).

Conflicting claims must be of such character as to justify a reasonable doubt or reasonable apprehension of danger in order that resort may be had to a court of equity. Reed v. Metropolitan Life Ins. Co., 206 Ga. 604, 58 S.E.2d 183 (1950).

Petition for interpleader brought by insurer, alleging that the insured changed the beneficiary named in the policy prior to his death, without alleging when or how the change was made, setting forth a copy of the policy, or stating whether or not the insured reserved to himself the right to change the beneficiary, was insufficient to inform the court of the nature, character, and foundation of the claim so as to enable the court to determine whether or not an interpleader was essential to the plaintiff's protection, and the trial court erred in overruling the general demurrer (now motion to dismiss) to the petition. Lowery v. Independent Life & Accident Ins. Co., 209 Ga. 753, 76 S.E.2d 5 (1953).

Conflicting claims to church funds. — Trial court properly granted a bank's petition for interpleader with regard to a dispute between church members over funds held by the bank because interpleader was the appropriate method to resolve the dispute over control of the funds since the dispute was secular and not of a religious nature and the resolu-

Requisites for Maintenance of Interpleader (Cont'd)

1. Close Question of Law, Conflicting Claims, and Disinterested Stakeholder (Cont'd)

tion of the dispute did not necessitate an impermissible intrusion or excessive entanglement into ecclesiastical matters. The bank was authorized to file the petition based on the terms of the bank's deposit agreement and O.C.G.A. § 23-3-90 once the bank learned of the dispute over the church funds. Nash v. United Bank-Thomaston, 319 Ga. App. 179, 734 S.E.2d 238 (2012).

In the hands of a disinterested person. — In the case of a petition of strict interpleader, the petitioner must be an indifferent stakeholder, without interest in the subject matter. Phillips v. Kelly, 176 Ga. 111, 167 S.E. 281 (1932).

A necessary ingredient of equitable interpleader is that the stakeholder must be disinterested. Midland Nat'l Life Ins. Co. v. Emerson, 121 Ga. App. 427, 174 S.E.2d 211 (1970).

One who seeks the aid of a court by petition for interpleader must claim no right in opposition to the claimants to the fund. Holland v. Sterling, 214 Ga. 583, 105 S.E.2d 894 (1958).

When the defendant is not disinterested, as when the defendant denies liability to the plaintiff as well as the other two parties, the action cannot be classified as a pleading for equitable interpleader. Midland Nat'l Life Ins. Co. v. Emerson, 121 Ga. App. 427, 174 S.E.2d 211 (1970).

Title in action or equitable relief. — The petition in the nature of interpleader cannot be maintained when plaintiffs allege that neither of defendants has any right or title to, or any interest in, the subject matter of the action, nor unless the relief sought is equitable relief. Phillips v. Kelly, 176 Ga. 111, 167 S.E. 281 (1932).

2. Liability of Petitioner

It is essential to an interpleader that the plaintiff be liable to only one of the defendants and never by any possibility to both. Finance Co. v. Jones Co., 141 Ga. 619, 81 S.E. 1033 (1914); Lilley v. Nixon, 214 Ga. 548, 105 S.E.2d 716 (1958).

To entitle a person to a petition of interpleader, one must be in a position in which one is liable to one of two or more persons, who claim from one the same debt or duty; and one claims no right in opposition to the claimants or either of them; and one does not know to whom one ought, of right, to render the debt or duty. Phillips v. Kelly, 176 Ga. 111, 167 S.E. 281 (1932).

When there is a question of double liability and not of double vexation for one liability, the plaintiff is not in that disinterested attitude as to the conflicting claimants which is essential to a petition of interpleader. Lilley v. Nixon, 214 Ga. 548, 105 S.E.2d 716 (1958).

Proceeding for interpleader improper. — If the question is not to which one of two or more claimants a single duty or debt should be rendered or paid or the same property should be delivered, but whether the person filing the proceeding is liable to each of two holders of different negotiable promissory notes transferred to them respectively before due, on which separate suits have been brought, whether they are not bona fide holders for value and without notice, and whether the debtor has a defense as against each or either of them, arising out of transactions with the original payee, this presents no case of a double claim to one debt or liability but a case of whether there is a double liability, and does not authorize a proceeding for interpleader proper. Gardner v. Haas, Howell & Dodd, Inc., 178 Ga. 685, 173 S.E. 863 (1934).

No interpleader regarding real estate commissions. — Petition by the owner of a tract of real estate, seeking to require two brokers with whom the plaintiff had listed the property, to interplead and set up their claims for one commission growing out of a sale of the property, failed to set forth a cause of action for interpleader, since two separate contracts of listing were alleged and there was a possibility under the allegations of the petition that the plaintiff might be liable to both parties. Lilley v. Nixon, 214 Ga. 548, 105 S.E.2d 716 (1958).

When the proceeds of a life insurance

policy are claimed by the insured's mother, as the original beneficiary, by the insured's wife, as the new beneficiary at the insured's direction to the insurer, and by the children, based on an instrument by the wife and mother establishing a trust for the benefit of the children, the essential for interpleaders are present. Kimbrell v. Lincoln Nat'l Life Ins. Co., 217 Ga. 335, 122 S.E.2d 94 (1961).

3. Existence of Reasonable Danger or Doubt

Real doubt or danger alone authorizes one to file a petition for interpleader. — It must appear from the allegations of the petition that the conflicting claims of the defendants are of such character as to render it doubtful or dangerous for the plaintiff to act; and in order to do this it is necessary that such claims be set forth so as to inform the court of their nature, character, and foundation, certainly to the extent of enabling the court to determine whether or not an interpleader is essential to the plaintiff's protection. Mullins v. Autry, 200 Ga. 645, 38 S.E.2d 390 (1946); Lilley v. Nixon, 214 Ga. 548, 105 S.E.2d 716 (1958).

Petition for interpleader authorized. — When two or more persons claim the same thing, by different and separate interests, and another person, not knowing to which of the claimants one ought of right to render a debt or duty, or to deliver property in one's custody, fears he may be hurt by some of them, one may exhibit a petition of interpleader against them. Johnson v. Harbison-Walker Mining Co., 181 Ga. 630, 183 S.E. 791 (1936).

Stakeholder is not entitled to protection by a court to the extent of being saved from all shadow of risk; and so when the stakeholder is in possession of all the facts and there is no question of law which is reasonably debatable, one's petition for interpleader should be denied. Citizens Bank v. Middlebrooks, 209 Ga. 330, 72 S.E.2d 298 (1952); Lowery v. Independent Life & Accident Ins. Co., 209 Ga. 753, 76 S.E.2d 5 (1953); Lilley v. Nixon, 214 Ga. 548, 105 S.E.2d 716 (1958).

If a holder knows all the facts, and the questions of law are not intricate or debatable, a petition for interpleader will not lie; but it is not incumbent upon the holder "to decide at his peril either close questions of fact, or nice questions of law"; and in such a case he may require the parties at interest to set up their claims for determination. Cannon v. Williams, 194 Ga. 808, 22 S.E.2d 838 (1942).

Doubt or danger that would authorize an interpleader must be reasonable. Daniel v. Citizens & S. Nat'l Bank, 182 Ga. 384, 185 S.E. 696 (1936).

Before one occupying the situation of a stakeholder can call upon adverse claimants of a fund in his hands to interplead, he must satisfactorily show to the court that their claims have such a foundation in law as will create a reasonable doubt as to his safety in undertaking to determine for himself to whom the fund belongs. Smith v. Folsom, 190 Ga. 460, 9 S.E.2d 824 (1940).

Doubt or danger may arise either in law or in fact as to the person to whom the money should be paid. Daniel v. Citizens & S. Nat'l Bank, 182 Ga. 384, 185 S.E. 696 (1936).

It must appear from the allegations of the petition that the conflicting claims of the defendants are of such character as to render it doubtful or dangerous for the plaintiff to act; and in order to do this it is necessary that such claims be set forth so as to inform the court of their nature, character, and foundation, certainly to extent of enabling the court to determine whether or not an interpleader is essential to the plaintiff's protection. Gardner v. Haas, Howell & Dodd, Inc., 178 Ga. 685, 173 S.E. 863 (1934); Lowery v. Independent Life & Accident Ins. Co., 209 Ga. 753, 76 S.E.2d 5 (1953).

Effect of Petition Generally

Complainant in a petition of interpleader merely stirs up a war and then leaves the real belligerents to fight it out, one retiring from the scene to repose in dignified ease, holding, the while, the prize which is to reward the victor. Perkins & Littlefield v. Trippe, 40 Ga. 225 (1869); Smith v. Folsom, 190 Ga. 460, 9 S.E.2d 824 (1940).

Where the owner of property has in his

Effect of Petition Generally (Cont'd)

possession funds due under a contract for the erection of a house, which are claimed by the materialmen under an asserted equitable assignment from the contractor and by the trustee of the contractor, who has since been adjudicated a bankrupt, the owner may bring the funds into court and maintain a petition for interpleader to compel the conflicting claimants to litigate between themselves their respective rights thereto. Smith v. Folsom, 190 Ga. 460, 9 S.E.2d 824 (1940).

Where petition for interpleader showed that the defendant insurer owed the beneficiary of two life insurance policies purchased by the deceased an undisputed amount, that two persons have made demands on it for the payment of such proceeds, each claiming to be the legal beneficiary of the policies, and that their conflicting claims are of such a character as to render it doubtful or dangerous for it to act, the judgment permitting the defendant to pay the full amount due on the policies into the registry of the court and then be discharged from further liability was not erroneous. Sanders v. Progressive Life Ins. Co., 212 Ga. 674, 94 S.E.2d 871 (1956).

On the trial of interpleader each of the claimants occupies the position of plaintiff, and must recover on the strength of one's own title rather than on the weakness of the other's title. Johnson v. Harbison-Walker Mining Co., 181 Ga. 630, 183 S.E. 791 (1936).

After a decree has been entered, ordering the petitioner to pay the fund in question into court and ordering the claimants to interplead and set up their claims to the fund, a suit in interpleader becomes, in effect, a proceeding between the claimants alone as adversaries to determine who is entitled to the fund, and the verdict was properly limited to the determination of this issue. Smith v. Folsom, 190 Ga. 460, 9 S.E.2d 824 (1940).

Pleading and Practice

Interpleader actions may be instituted in Georgia under former Code 1933, § 37-1503 et seq. (see O.C.G.A. T. 23, Ch. 3, Art. 4) or under Ga. L. 1967, p. 226, § 11 (see O.C.G.A. § 9-11-22). Stone v. Davis, 242 Ga. 17, 247 S.E.2d 756 (1978).

The remedy for interpleader provided for in Ga. L. 1967, p. 226, § 11 (see O.C.G.A. § 9-11-22) is in addition to and in no way supersedes or limits the remedy of equitable interpleader provided for in former Code 1933, § 37-1503 et seq. (see O.C.G.A. T. 23, Ch. 3, Art. 4). Stone v. Davis, 242 Ga. 17, 247 S.E.2d 756 (1978).

Ga. L. 1967, p. 226, § 11 (see O.C.G.A. § 9-11-22) has broadened and liberalized the rules relating to the remedy of interpleader so as to render the technicalities formally associated with the equitable remedy of a strict bill of interpleader no longer applicable to complaints tried under that section. Stone v. Davis, 242 Ga. 17, 247 S.E.2d 756 (1978).

Permission to interplead a trustee need not be secured from the court of bankruptcy which appointed him, since an interpleader suit is not an interference with, and cannot mature into a charge on, the assets of bankrupt. Smith v. Folsom, 190 Ga. 460, 9 S.E.2d 824 (1940).

Successor trustee held not entitled to summary judgment. — A successor trustee that brought an interpleader action against the original trustee and a broker, involving $60,000 in compensation which the original trustee was entitled to under a court order, was not entitled to summary judgment. The claims of the two interpled parties were not adverse or competing. The original trustee only claimed compensation under the court order as a trustee, not in any other capacity, while the broker only claimed a fee as a broker. Trust Co. Bank v. Citizens & S. Trust Co., 260 Ga. 124, 390 S.E.2d 589 (1990).

Court erred in interpreting governing documents. — In an interpleader action, the trial court erred in the court's interpretation of the governing contracts as the funds held by the sheriff for a bail bond corporation were really held on behalf of the owners of the corporation in the owners' individual capacities; thus, a judgment creditor of the individuals was entitled to the funds. Freund v. Warren, 320 Ga. App. 765, 740 S.E.2d 727 (2013).

Time of filing. — The petition should be filed before either claimant has had his

right established by judgment. Brown v. Wilson, 56 Ga. 534 (1876); Moore v. Hill, 59 Ga. 760 (1877). See 7 Enc. Dig. 753.

Discharge of party appropriate. — Because a husband's counterclaim for reimbursement of the husband's premium payments did not make the insurer an interested stakeholder so as to preclude its interpleader action, the trial court erred in denying the insurer's motion for discharge under O.C.G.A. § 23-3-90(a). Am. Gen. Life & Accident Ins. Co. v. Vance, 297 Ga. App. 677, 678 S.E.2d 135 (2009).

Attorneys' fees directly against prevailing claimant. — O.C.G.A. § 23-3-90 could not justify an attorney's fee directly against the prevailing claimant to an interplead fund. Cable Atlanta, Inc. v. Project, Inc., 749 F.2d 626 (11th Cir. 1984).

The award to a personal injury plaintiff of attorney fees and costs incurred by the plaintiff (defendant's administrator) in bringing the action was within the court's discretion, since the trial court had already allowed the administrator to recover her costs from the fund deposited in the court. Cherokee Ins. Co. v. Lewis, 204 Ga. App. 152, 418 S.E.2d 616, cert. denied, 204 Ga. App. 921, 418 S.E.2d 616 (1992).

RESEARCH REFERENCES

ALR. — Right of judgment debtor to interplead, 48 A.L.R. 966.

Nature and extent of relief of successful intervener or interpleader in attachment, 66 A.L.R. 908.

Right of owner to maintain bill of interpleader against contractor and lien claimants and others in respect of fund arising from construction contracts, 70 A.L.R. 515.

Right of trustee, executor, or administrator to maintain interpleader, 152 A.L.R. 1122.

Insurance: facility of payment clause, 166 A.L.R. 10.

Allowance of interest on interpleaded or impleaded disputed funds, 15 A.L.R.2d 473.

Corporation's right to interplead claimants to dividends, 46 A.L.R.2d 980.

Allowance of attorney's fees to party interpleading claimants to funds or property, 48 A.L.R.2d 190.

Amount of attorney's compensation in absence of contract or statute fixing amount, 57 A.L.R.3d 475; 57 A.L.R.3d 550; 57 A.L.R.3d 584; 58 A.L.R.3d 201; 58 A.L.R.3d 317; 17 A.L.R.5th 366; 23 A.L.R.5th 241.

Right of party who is an attorney and appears for himself to award of attorney's fees against opposing party as element of costs, 78 A.L.R.3d 1119.

Excessiveness or adequacy of attorneys' fees in matters involving real estate — modern cases, 10 A.L.R.5th 448.

Calculations of attorneys' fees under Federal Tort Claims Act—28 USCS sec. 2678, 86 A.L.R. Fed. 866.

23-3-91. Verification of petition.

Every petition for interpleader shall be verified and shall show that the petitioner is not in collusion with any party claiming the property.

History. — Civil Code 1895, § 4897; Civil Code 1910, § 5472; Code 1933, § 37-1504.

History of Code section. — This Code section is derived from the decisions in Burton v. Black, 32 Ga. 53 (1861) and Tyus v. Rust, 37 Ga. 574 (1868).

JUDICIAL DECISIONS

Cited in Davis v. Davis, 96 Ga. 136, 21 S.E. 1002 (1895); Campbell v. Trust Co., 197 Ga. 37, 28 S.E.2d 471 (1943); Adler v. Ormond, 117 Ga. App. 600, 161 S.E.2d 435 (1968); White v. Georgia Farm Bureau Mut. Ins. Co., 234 Ga. 186, 215 S.E.2d 240

(1975); Stone v. Davis, 242 Ga. 17, 247 S.E.2d 756 (1978).

23-3-92. Collateral interpleader.

If, in the progress of any proceeding in equity, the court perceives the necessity for parties to interplead, it may order such interpleader as collateral and ancillary to the main case.

History. — Orig. Code 1863, § 3157; Code 1868, § 3169; Code 1873, § 3236; Code 1882, § 3236; Civil Code 1895, § 4898; Civil Code 1910, § 5473; Code 1933, § 37-1505.

Law reviews. — For article discussing aspects of third-party practice (impleader) under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 355 (1968).

JUDICIAL DECISIONS

Cited in Goodwin v. Bowers, 169 Ga. 36, 149 S.E. 567 (1929); Adler v. Ormond, 117 Ga. App. 600, 161 S.E.2d 435 (1968); C & S Land, Transp. & Dev. Corp. v. Grubbs, 141 Ga. App. 393, 233 S.E.2d 486 (1977); Stone v. Davis, 242 Ga. 17, 247 S.E.2d 756 (1978).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 14C Am. Jur. Pleading and Practice Forms, Interpleader, § 1 et seq.

ARTICLE 5

BILLS OF PEACE

23-3-110. Bill of peace; when entertained; ancillary injunction.

(a) It being the interest of this state that there shall be an end of litigation, equity will entertain a bill of peace:

(1) To confirm some right which has been previously satisfactorily established by more than one legal trial and is likely to be litigated again;

(2) To avoid a multiplicity of actions by establishing a right, in favor of or against several persons, which is likely to be the subject of legal controversy; or

(3) In other similar cases.

(b) As ancillary to this jurisdiction, equity will grant perpetual injunctions.

History. — Orig. Code 1863, §§ 3154, 3155; Code 1868, §§ 3166, 3167; Code 1873, §§ 3233, 3234; Code 1882, §§ 3233, 3234; Civil Code 1895, §§ 4894, 4895;

Civil Code 1910, §§ 5469, 5470; Code 1933, §§ 37-1501, 37-1502.

Law reviews. — For article discussing aspects of third-party practice (impleader) under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 355 (1968).

JUDICIAL DECISIONS

Purpose of section. — The principle upon which courts exercising equitable jurisdiction interfere and grant relief is to suppress useless litigation; to prevent multiplicity of suits; to restrain oppressive litigation and to prevent irreparable mischief. Bond v. Little, 10 Ga. 395 (1851); Sutton v. Adams, 180 Ga. 48, 178 S.E. 365 (1934); Consumers Fin. Corp. v. Lamb, 217 Ga. 359, 122 S.E.2d 101 (1961); Allstate Ins. Co. v. Hill, 218 Ga. 430, 128 S.E.2d 321 (1962).

Complainant's right must be satisfactorily established at law before equity will interfere. Bond v. Little, 10 Ga. 395 (1851).

Trial court approval for suit required. — Trial court properly summarily dismissed an attorney's living trust's action against a beach cottage purchaser because a bill of peace and perpetual injunction had been entered and the trust sued the purchaser without obtaining trial court approval, as required by the bill of peace and perpetual injunction. Moreton Rolleston, Jr., Living Trust v. Kennedy, 277 Ga. 541, 591 S.E.2d 834, cert. denied, 541 U.S. 1042, 124 S. Ct. 2168, 158 L. Ed. 2d 732 (2004).

When the relief can be clearly afforded at law, this section does not apply. Guess v. Stone Mt. Granite & Ry., 67 Ga. 215 (1881); Mayor of Gainesville v. Dean, 124 Ga. 750, 53 S.E. 183 (1906).

Where the acts of the heir's agent, in charge of operating the decedent's corporation, in mismanaging the corporation, substantially the entire stock of which was owned by the estate, were continuous, still threatened and directly affected the value of the stock, whether the alleged acts are deemed trespasses or waste, it was unnecessary to go further and allege that the defendant was insolvent, since equity is empowered to enjoin such acts, where they would otherwise be likely to give rise to multiplicity of separate suits by the individual heirs against the agent. Shingler v. Shingler, 184 Ga. 671, 192 S.E. 824 (1937).

While avoidance of a multiplicity of suits may, in a proper case, be considered as an independent ground of equitable jurisdiction, and not a mere auxiliary to other equities present, it does not alone create an equitable cause of action, regardless of other circumstances. Dobbs v. FDIC, 187 Ga. 569, 1 S.E.2d 672 (1939).

Cited in Orton v. Madden, 75 Ga. 83 (1885); Mayer & Ullman v. Coley, 80 Ga. 207, 7 S.E. 164 (1887); Lightner v. Belk, 178 Ga. 766, 174 S.E. 349 (1934); Hollingsworth v. People's Bank, 179 Ga. 704, 177 S.E. 743 (1934); Banner v. Cohen, 182 Ga. 271, 185 S.E. 333 (1936); Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937); Shingler v. Shingler, 184 Ga. 671, 192 S.E. 824 (1937); Ewing v. Tanner, 184 Ga. 773, 193 S.E. 243 (1937); Groover v. Brandon, 200 Ga. 153, 36 S.E.2d 84 (1945); Harris v. Rowe, 200 Ga. 265, 36 S.E.2d 787 (1946); Avary v. Avary, 202 Ga. 22, 41 S.E.2d 314 (1947); Worley v. Gaston, 210 Ga. 350, 80 S.E.2d 304 (1954); Kirchman v. Kirchman, 212 Ga. 488, 93 S.E.2d 685 (1956); Montgomery v. Pierce, 212 Ga. 545, 93 S.E.2d 758 (1956); Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); Maddox v. Dixie Feeds, Inc., 218 Ga. 378, 127 S.E.2d 918 (1962); Timeplan Loan & Inv. Corp. v. Morehead, 220 Ga. 762, 141 S.E.2d 420 (1965); Gill v. Myrick, 228 Ga. 253, 185 S.E.2d 72 (1971); C & S Land, Transp. & Dev. Corp. v. Grubbs, 141 Ga. App. 393, 233 S.E.2d 486 (1977).

OPINIONS OF THE ATTORNEY GENERAL

Justices of the peace may not issue bills of peace. — Since the superior court has exclusive jurisdiction over equity matters and a bill of peace is an equitable remedy, justices of the peace do not have jurisdiction to entertain a petition for

such relief; it follows that any such bill of peace issued by a justice of the peace would be void and of no effect. 1957 Op. Att'y Gen. p. 66.

RESEARCH REFERENCES

ALR. — Constitutionality of statute conferring on chancery courts power to abate public nuisance, 22 A.L.R. 542; 75 A.L.R. 1298.

Avoidance of multiplicity of suits as ground of jurisdiction in equity of a suit by one out of possession to quiet title against persons in possession of different portions of the land in severalty, 30 A.L.R. 109.

Propriety of permanently enjoining one guilty of unauthorized use of trade secret from engaging in sale or manufacture of device in question, 38 A.L.R.3d 572.

ARTICLE 6

TAXPAYER PROTECTION AGAINST FALSE CLAIMS

Editor's notes. — Ga. L. 2012, p. 127, § 1-1/HB 822, not codified by the General Assembly, provides: "Part I of this Act shall be known and may be cited as the 'Georgia Taxpayer Protection False Claims Act.'"

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Taxpayers' Actions, § 1 et seq.

23-3-120. Definitions.

As used in this article, the term:

(1) "Claim" means any request or demand, whether under a contract or otherwise, for money or property, and whether or not this state or a local government has title to such money or property that is:

(A) Presented to an officer, employee, or agent of the state or local government;

(B) Made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the state's or local government's behalf or to advance a state or local government program or interest, and if the state or local government:

(i) Provides or has provided any portion of the money or property requested or demanded; or

(ii) Will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Such term shall not include requests or demands for money or property that the state or local government has paid to an individual

as compensation for state or local government employment or as an income subsidy with no restrictions on that individual's use of the money or property.

(2) "Knowing" and "knowingly" mean that a person, with respect to information:

(A) Has actual knowledge of the information;

(B) Acts in deliberate ignorance of the truth or falsity of the information; or

(C) Acts in reckless disregard of the truth or falsity of the information.

No proof of specific intent to defraud is required.

(3) "Local government" means any Georgia county, municipal corporation, consolidated government, authority, board of education or other local public board, body, or commission, town, school district, board of cooperative educational services, local public benefit corporation, hospital authority, taxing authority, or other political subdivision of the state or of such local government, including the Metropolitan Atlanta Rapid Transit Authority.

(4) "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(5) "Obligation" means an established duty, whether fixed or not, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee based or similar relationship, from law or regulation, or from the retention of any overpayment.

(6) "State" means the State of Georgia and any state department, board, bureau, division, commission, committee, public benefit corporation, public authority, council, office, or other governmental entity performing a governmental or proprietary function for this state.

History. — Code 1981, § 23-3-120, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822; Ga. L. 2013, p. 141, § 23/HB 79.

Law reviews. — For article, "The Georgia Taxpayer Protection and False Claims Act," see 65 Mercer L. Rev. 1 (2013). For annual survey on construction law, see 65 Mercer L. Rev. 67 (2013).

JUDICIAL DECISIONS

Complaint based on information / records of public employer. — Dismissal of a complaint filed by two teachers against a charter school was barred under the Taxpayer Protection Against False Claims Act, O.C.G.A. § 23-3-120 et seq., because the complaint asserted that while employed at the school, the teachers had access to information which led the teachers to believe that the school was violating state and federal laws as to student count and special education services, which were allegations based upon information or records that the teacher had access to

as a result of the teachers' employment. Campbell v. Cirrus Education, Inc., No. A20A0163, 2020 Ga. App. LEXIS 362 (June 19, 2020).

23-3-121. Submission of false information; liability; no application to taxation.

(a) Any person, firm, corporation, or other legal entity that:

(1) Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval;

(2) Knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim;

(3) Conspires to commit a violation of paragraph (1), (2), (4), (5), (6), or (7) of this subsection;

(4) Has possession, custody, or control of property or money used, or to be used, by the state or local government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(5) Being authorized to make or deliver a document certifying receipt of property used, or to be used, by the state or local government and, intending to defraud the state or local government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the state or local government who lawfully may not sell or pledge the property; or

(7) Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state or local government, or knowingly conceals, knowingly and improperly avoids, or decreases an obligation to pay or transmit money or property to the state or a local government

shall be liable to the State of Georgia for a civil penalty of not less than $5,500.00 and not more than $11,000.00 for each false or fraudulent claim, plus three times the amount of damages which the state or local government sustains because of the act of such person.

(b) The provisions of subsection (a) of this Code section notwithstanding, if the court finds that:

(1) The person committing the violation of this subsection furnished officials of the state or local government responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(2) Such person fully cooperated with any government investigation of such violation; and

(3) At the time such person furnished the state or local government with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this article with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not more than two times the amount of the actual damages which the state or local government sustained because of the act of such person.

(c) A person violating any provision of this Code section shall also be liable to the state or local government for all costs, reasonable expenses, and reasonable attorney's fees incurred by the state or local government in prosecuting a civil action brought to recover the damages and penalties provided under this article.

(d) Any information furnished pursuant to paragraph (2) of subsection (b) of this Code section shall be exempt from disclosure under Article 4 of Chapter 18 of Title 50.

(e) This Code section shall not apply to claims, records, or statements made concerning taxes under the revenue laws of this state.

History. — Code 1981, § 23-3-121, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822.

Law reviews. — For article, "The Georgia Taxpayer Protection and False Claims Act," see 65 Mercer L. Rev. 1 (2013).

RESEARCH REFERENCES

ALR. — Measure and Elements of Damages Under State False Claims Acts, 41 A.L.R.7th Art. 2

Recognition and Application of Tort of Negligent Assault and Battery and Indirect Battery, 41 A.L.R.7th Art. 8

Liability for Trespass or Nuisance in Hydraulic Fracturing, Hydro-fracturing, or Hydro-fracking, 41 A.L.R.7th Art. 1

23-3-122. Investigations by Attorney General; civil actions authorized; intervention by government; limitation on participating in litigation; stay of discovery; alternative remedies; division of recovery; limitations.

(a) The Attorney General shall be authorized to investigate suspected, alleged, and reported violations of this article. If the Attorney General finds that a person has violated or is violating this article, then the Attorney General may bring a civil action against such person under this article. The Attorney General may delegate authority to a

district attorney or other appropriate official of a local government to investigate violations that may have resulted in damages to such local government under Code Section 23-3-121 and may delegate to the local government the authority to bring a civil action on its own behalf, or on behalf of any subdivision of such local government, to recover damages sustained by such local government as a result of such violations, as well as all multiple damages, costs, expenses, attorney's fees, and civil penalties available under Code Section 23-3-121. The Attorney General may delegate to a district attorney or local government the authority to pursue an action brought by a private person under subsection (b) of this Code section. Notwithstanding any such delegation of authority, the Attorney General shall retain the authority to continue or discontinue the prosecution of any such action and to withdraw any such authority previously delegated to a district attorney or local government.

(b)(1) Subject to the exclusions set forth in this Code section, a civil action under this article may also be brought by a private person upon written approval by the Attorney General. A civil action shall be brought in the name of the State of Georgia or local government, as applicable. The civil action may be dismissed only if the Attorney General gives written consent to the dismissal stating the reasons for consenting to such dismissal and the court enters an order approving the dismissal.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Attorney General by certified mail or statutory overnight delivery. The complaint shall be filed in camera and under seal, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The state or, if delegated the authority by the Attorney General, local government may elect to intervene and proceed with the action within 60 days after the Attorney General receives both the complaint and the material evidence and information.

(3) The state or, if delegated the authority by the Attorney General, the local government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2) of this subsection. Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this Code section until 30 days after the complaint is unsealed and served upon the defendant.

(4) Before the expiration of the 60 day period or any extensions obtained under paragraph (3) of this subsection, the state or local government shall:

(A) Proceed with the civil action, in which case the civil action shall be conducted by the state or local government; or

(B) Notify the court that it declines to take over the civil action, in which case the person bringing the civil action shall have the right to proceed with the civil action.

(5) When a person brings a civil action under this subsection, no person other than the state or, if delegated the authority by the Attorney General, the local government may intervene or bring a related civil action based on the facts underlying the pending civil action.

(6) Any evidence and information provided to the Attorney General or his or her designee, including any district attorney or local government, by a private person in connection with an action under this Code section shall not constitute public records and shall be exempt from disclosure under Article 4 of Chapter 18 of Title 50. Any such evidence also shall be protected by the common interest privilege and work product doctrine. To effectuate the law enforcement purposes of this article in combating fraud and false claims directed at the public's funds, it is the public policy of this state that private persons be authorized to take actions to provide to the Attorney General or local government such information and evidence.

(c)(1) If the state or local government elects to intervene and proceeds with the civil action, it shall have the primary responsibility for prosecuting the civil action and shall not be bound by an act of the person bringing such civil action. Such person shall have the right to continue as a party to the civil action, subject to the limitations set forth in this subsection.

(2) If the Attorney General has consented to a dismissal or elected not to proceed with a civil action, a local government may dismiss the civil action, notwithstanding the objections of the person initiating the civil action, if the person has been notified by the local government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(3) The state or local government may settle the civil action with the defendant, notwithstanding the objections of the person initiating the civil action, if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(4) Upon a showing by the state or local government that unrestricted participation during the course of the litigation by the person initiating the civil action would interfere with or unduly delay the

state or local government's litigation of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as:

(A) Limiting the number of witnesses the person may call;

(B) Limiting the length of the testimony of such witnesses;

(C) Limiting the person's cross-examination of witnesses; or

(D) Otherwise limiting the participation of the person in the litigation.

(d) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the civil action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation of the person in the litigation.

(e) If the state or local government elects not to proceed with the civil action, the person who initiated the civil action shall have the right to conduct the civil action. If the state or local government so requests, it shall be served with copies of all pleadings filed in the civil action and shall be supplied, without cost, with copies of all deposition transcripts. When a person proceeds with the civil action, the court may nevertheless permit the state or local government to intervene at a later date upon a showing of good cause.

(f) Whether or not the state or local government proceeds with the civil action, upon a showing by the state or local government that certain actions of discovery by the person initiating the civil action would interfere with the state or local government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60 day period upon a further showing in camera that the state or local government has pursued the criminal or civil investigation or proceedings with reasonable diligence, and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(g) Notwithstanding subsection (b) of this Code section, the state or local government may elect to pursue its claim through any alternate remedy available to the state or local government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the civil action shall have the same rights in such proceeding as such person would have had if the civil action had continued under this Code section. Any finding of fact or conclusion of law made in such

other proceeding that becomes final shall be conclusive on all parties to a civil action under this Code section. For purposes of this subsection, a finding or conclusion shall be deemed final if it has been finally determined on appeal to the appropriate court, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(h)(1) If the state or local government proceeds with a civil action brought by a private person under subsection (b) of this Code section, such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the civil action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the civil action. Where the civil action is one which the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the civil action, relating to allegations or transactions in a criminal, civil, or administrative hearing; in a legislative, administrative, or State Accounting Office report, hearing, audit, or investigation; or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing such civil action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the state or local government does not proceed with a civil action under this Code section, the person bringing the civil action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. Such amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the civil action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the state or local government proceeds with the civil action, if the court finds that the civil action was brought by a person who planned and initiated the violation of this article upon which the civil action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the civil action which the person would otherwise receive under

paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the civil action is convicted of criminal conduct arising from his or her role in the violation of this article, such person shall be dismissed from the civil action and shall not receive any share of the proceeds of the civil action. Such dismissal shall not prejudice the right of the State of Georgia to continue the civil action, represented by the Attorney General or local government attorney to whom the Attorney General has delegated authority.

(4) If the state or local government does not proceed with the civil action and the person bringing the civil action conducts the civil action, the court may award to the defendant its reasonable attorney's fees and expenses against the person bringing the civil action if the defendant prevails in the civil action and the court finds that the claim of the person bringing the civil action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(i) For purposes of this subsection, the term "public employee," "public official," and "public employment" shall include federal, state, and local employees and officials. No civil action shall be brought under this article by a person who is or was a public employee or public official if the allegations of such action are substantially based upon:

(1) Allegations of wrongdoing or misconduct which such person had a duty or obligation to report or investigate within the scope of his or her public employment or office; or

(2) Information or records to which such person had access as a result of his or her public employment or office.

(j)(1) No court shall have jurisdiction over a civil action brought under subsection (b) of this Code section against a member of the General Assembly or a member of the judiciary if the civil action is based on evidence or information known to the state when the civil action was brought.

(2) In no event may a person bring a civil action under subsection (b) of this Code section which is based upon allegations or transactions which are the subject of a civil or administrative proceeding to which the State of Georgia is already party.

(3) The court shall dismiss a civil action or claim under this Code section, unless opposed by the state or local government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed:

(A) In a state criminal, civil, or administrative hearing in which the state or local government or its agent is a party;

(B) In a state or local government legislative or other state or local government report, hearing, audit, or investigation that is made on the public record or disseminated broadly to the general public, provided that such information shall not be deemed publicly disclosed in a report or investigation because it was disclosed or provided pursuant to Article 4 of Chapter 18 of Title 50, the federal Freedom of Information Act, or under any other federal, state, or local law, rule, or program enabling the public to request, receive, or view documents or information in the possession of public officials or public agencies; or

(C) From the news media, provided that such allegations or transactions are not publicly disclosed in the news media merely because information of allegations or transactions have been posted on the Internet or on a computer network, unless the action is brought by the Attorney General or local government, or the person bringing the action is an original source of the information. For purposes of this subparagraph, the term "original source" means a person who:

(i) Prior to a public disclosure under this paragraph, has voluntarily disclosed to the state or a local government the information on which allegations or transactions in a claim are based; or

(ii) Has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions and who has voluntarily provided the information to the state or a local government before filing a civil action under this Code section.

(k) The state or local government shall not be liable for expenses which a private person incurs in bringing a civil action under this article.

(l)(1) Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of a civil action under this Code section or other efforts to stop one or more violations of this article.

(2) Relief under paragraph (1) of this subsection shall include reinstatement with the same seniority status that the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An

action under this subsection may be brought in the appropriate superior court of this state for the relief provided in this subsection.

(3) A civil action under this subsection shall not be brought more than three years after the date when the discrimination occurred.

History. — Code 1981, § 23-3-122, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822; Ga. L. 2013, p. 141, § 23/HB 79.

JUDICIAL DECISIONS

Private action required permission from attorney general. — University administrator's claim under the Georgia Taxpayer Protection Against False Claims Act (TPAFCA), O.C.G.A. § 23-3-120 et seq., was rejected because the plain language of O.C.G.A. § 23-3-122(b)(1) required that a private person have the written permission of the Georgia Attorney General to bring a claim under the TPAFCA. McKinney v. Fuciarelli, 298 Ga. 873, 785 S.E.2d 861 (2016).

Complaint based on information / records of public employer. — Dismissal of a complaint filed by two teachers against a charter school was barred under the Taxpayer Protection Against False Claims Act, O.C.G.A. § 23-3-120 et seq., because the complaint asserted that while employed at the school, the teachers had access to information which led the teachers to believe that the school was violating state and federal laws as to student count and special education services, which were allegations based upon information or records that the teacher had access to as a result of the teachers' employment. Campbell v. Cirrus Education, Inc., No. A20A0163, 2020 Ga. App. LEXIS 362 (June 19, 2020).

Cited in Campbell v. Cirrus Education, Inc., No. A20A0191, 2020 Ga. App. LEXIS 361 (June 19, 2020).

23-3-123. Statute of limitations; service of subpoena; limitation on disclosures; intervention; preponderance of the evidence standard; effect of criminal conviction on civil actions.

(a) Except as provided in paragraph (3) of subsection (l) of Code Section 23-3-122, all civil actions under this article shall be filed pursuant to Code Section 23-3-122 within six years after the date the violation was committed or three years after the date when facts material to the right of civil action are known or reasonably should have been known by the state or local government official charged with the responsibility to act in the circumstances, whichever occurs last; provided, however, that in no event shall any civil action be filed more than ten years after the date upon which the violation was committed.

(b) A subpoena requiring the attendance of a witness at a trial or hearing conducted under Code Section 23-3-122 may be served at any place in this state.

(c) For purposes of applying subsection (b) of Code Section 9-11-9, in pleading a civil action brought under this article, the qui tam plaintiff shall not be required to identify specific claims that result from an

alleged course of misconduct or any specific records or statements used if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of Code Section 23-3-121 are likely to have occurred and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government to investigate effectively and defendants to defend fairly the allegations made.

(d) If the state or local government elects to intervene and proceed with a civil action brought under subsection (b) of Code Section 23-3-122, the state or local government may file its own complaint or amend the complaint of a person who has brought an action under such subsection to clarify or add detail to the claims in which the state or local government is intervening and to add any additional claims with respect to which the state or local government contends it is entitled to relief. For statute of limitations purposes, any such state or local government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the state or local government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(e) In any action brought under Code Section 23-3-122, the plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(f) Notwithstanding any other provision of law, a final judgment rendered in favor of the state or local government or the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any civil action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of Code Section 23-3-122.

History. — Code 1981, § 23-3-123, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822.

Law reviews. — For article, "The Georgia Taxpayer Protection and False Claims Act," see 65 Mercer L. Rev. 1 (2013).

23-3-124. Venue.

All civil actions brought under this article in a court of this state shall be brought in the county where the defendant or any one defendant, in the case of multiple defendants or defendants who are not residents of the State of Georgia, resides, can be found, transacts business, or commits an act in furtherance of the submittal of a false or fraudulent claim to the state or local government. Civil actions under this article

may be brought in courts of the United States and other states if there is pendent jurisdiction.

History. — Code 1981, § 23-3-124, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822.

23-3-125. Civil investigative demands.

(a) As used in this Code section, the term:

(1) "Custodian" means the custodian, or any deputy custodian, designated by the Attorney General under paragraph (1) of subsection (j) of this Code section.

(2) "Documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document or data compilations stored in or accessible through computer or other information retrieval system, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery.

(3) "False claims law" means:

(A) This article; and

(B) Any Act of Congress or of the legislature which prohibits or makes available to the federal government, state, or any local government in any court of this state, of another state or the District of Columbia, or of local government or of the United States any civil remedy with respect to any false claim against, bribery of, or corruption of any officer or employee of any state, the District of Columbia, local government, or the United States.

(4) "False claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law.

(5) "False claims law investigator" means any attorney or investigator employed by the Department of Law or any other agency of the federal government, state, or any local government who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the state or local government or the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation.

(6) "Official use" means any use that is consistent with the law and the regulations and policies of the Department of Law or any other agency of the federal government, state, or any local government

participating in any of the matters in question, including use in connection with internal memoranda, and reports; communications between the Attorney General or any other agency of the federal government, state, or any local government participating in the matters in question and any other agency of the federal government, state, or any local government, or a contractor of an agency of the federal government, state, or any local government, undertaken in furtherance of a federal, state, or local government or other governmental investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda, and briefs submitted to a court or other tribunal; and communications with federal, state, or local government or other governmental investigators, auditors, consultants and experts, the counsel of other parties, arbitrators, and mediators, concerning an investigation, case, or proceeding.

(7) "Person" means any natural person, partnership, corporation, association, or other legal entity, including any state or local government or political subdivision of a state.

(8) "Product of discovery" includes:

(A) The original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) Any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A) of this paragraph; and

(C) Any index or other manner of access to any item listed in subparagraph (A) of this paragraph.

(b)(1) For purposes of this Code section, whenever the Attorney General, or his or her designee, has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or his or her designee, may, before commencing a civil proceeding under subsection (a) of Code Section 23-3-122 or other false claims law, or making an election under subsection (b) of Code Section 23-3-122, issue in writing and cause to be served upon such person a civil investigative demand requiring such person to:

(A) Produce such documentary material for inspection and copying;

(B) Answer in writing written interrogatories with respect to such documentary material or information;

(C) Give oral testimony concerning such documentary material or information; or

(D) Furnish any combination of such documentary material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection, including to a district attorney or other local government attorney. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the deputy attorney general, or an assistant attorney general shall cause to be served, in any manner authorized by this Code section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. Any information obtained by the Attorney General or a designee of the Attorney General under this Code section may be shared with any qui tam relator if the Attorney General or such designee determines it is necessary as part of any false claims law investigation.

(2)(A) Each civil investigative demand issued under paragraph (1) of this subsection shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation and the applicable provision of law alleged to have been violated.

(B) If such demand is for the production of documentary material, the demand shall:

(i) Describe each class of documentary material to be produced with such definiteness and certainty as to permit such documentary material to be fairly identified;

(ii) Prescribe a return date for each such class which will provide a reasonable period of time within which the documentary material so demanded may be assembled and made available for inspection and copying; and

(iii) Identify the false claims law investigator to whom such documentary material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall:

(i) Set forth with specificity the written interrogatories to be answered;

(ii) Prescribe dates at which time the answers to such written interrogatories shall be submitted; and

(iii) Identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall:

(i) Prescribe a date, time, and place at which the oral testimony shall be commenced;

(ii) Identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) Specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) Notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) Describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this Code section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the product of discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this Code section shall be a date which is not less than seven days after the date on which such demand is received, unless the Attorney General or his or her designee determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General or his or her designee shall not authorize the issuance under this Code section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(c)(1) A civil investigative demand issued under subsection (b) of this Code section shall not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such documentary material, answers, or testimony would be protected from disclosure under:

(A) Standards applicable to subpoenas or subpoenas duces tecum issued by a court of the state or of the United States to aid in a grand jury investigation; or

(B) Standards applicable to discovery requests under Chapter 11 of Title 9, the "Georgia Civil Practice Act," to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this Code section.

(2) Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law, other than this Code section, preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand shall not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(d)(1) Any civil investigative demand issued under subsection (b) of this Code section may be served in this state by a false claims law investigator or by a sheriff, deputy sheriff, marshal, or deputy marshal at any place within the territorial jurisdiction of any court of this state.

(2) Any such demand or any petition filed under subsection (k) of this Code section may be served upon any person who is not found within the territorial jurisdiction of any court of this state in such manner as applicable law prescribes for service outside this state. To the extent that the courts of this state can assert jurisdiction over any such person consistent with due process, any such court shall have the same jurisdiction to take any action respecting compliance with this Code section by any such person that such court would have if such person were personally within the jurisdiction of such court. Compliance with this Code section may also be enforced in courts of other states, of the District of Columbia, and of the United States.

(e)(1) Service of any civil investigative demand issued under subsection (b) of this Code section or of any petition filed under subsection (k) of this Code section may be made upon a partnership, corporation, association, or other legal entity by:

(A) Delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) Delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) Depositing an executed copy of such demand or petition via the United States Postal Service by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Service of any such demand or petition may be made upon any natural person by:

(A) Delivering an executed copy of such demand or petition to the person; or

(B) Depositing an executed copy of such demand or petition via the United States Postal Service by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(f) A verified return by the individual serving any civil investigative demand issued under subsection (b) of this Code section or any petition filed under subsection (k) of this Code section setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail or statutory overnight delivery, such return shall be accompanied by the return post office receipt or other receipt of delivery of such demand.

(g)(1) The production of documentary material in response to a civil investigative demand served under this Code section shall be made under a sworn certificate, in such form as the demand designates, by:

(A) In the case of a natural person, the person to whom the demand is directed; or

(B) In the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Any person upon whom any civil investigative demand for the production of documentary material has been served under this Code section shall make such documentary material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may

direct under paragraph (1) of subsection (k) of this Code section. Such documentary material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such documentary material.

(h) Each interrogatory in a civil investigative demand served under this Code section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by:

(1) In the case of a natural person, the person to whom the demand is directed; or

(2) In the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(i)(1) The examination of any person pursuant to a civil investigative demand for oral testimony served under this Code section shall be taken before an officer authorized to administer oaths and affirmations by the laws of this state, or of the United States, or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by and in a manner consistent with Chapter 11 of Title 9, the "Georgia Civil Practice Act."

(2) The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the state or local government, any person who may be agreed upon by the attorney for the state or local government and the

person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) The oral testimony of any person taken pursuant to a civil investigative demand served under this Code section shall be taken in the county within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence, or the refusal to sign of the witness, together with the reasons, if any, given therefor.

(5) The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General or his or her designee may, for good cause, limit such witness to inspection of the official transcript of the witness's testimony.

(7)(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (b) of this Code section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the

grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and shall not, directly or through counsel, otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the superior court under paragraph (1) of subsection (k) of this Code section for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of Title 24.

(8) Any person appearing for oral testimony under a civil investigative demand issued under subsection (b) of this Code section shall be entitled to the same fees and allowances which are paid to witnesses in the superior courts and state courts of Georgia.

(j)(1) The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this Code section and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2)(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this Code section shall transmit them to the custodian. The custodian shall take physical possession of such documentary material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4) of this subsection.

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator or other officer or employee of the Attorney General or any other agency of the state or local government participating in an investigation of the matters in question. Such documentary material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this Code section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other

than a false claims law investigator or other officer or employee of the Attorney General or any other agency of the federal government or of a state or local government participating in an investigation of the matters in question authorized under subparagraph (B) of this paragraph. The prohibition in the preceding sentence on the availability of documentary material, answers, or transcripts shall not apply if consent is given by the person who produced such documentary material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such documentary material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the General Assembly, including any committee or subcommittee of the General Assembly, or to any other agency of the state or local government or the United States for use by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe:

(i) Documentary material and answers to interrogatories shall be available for examination by the person who produced such documentary material or answers, or by a representative of that person authorized by that person to examine such documentary material and answers; and

(ii) Transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Whenever the Attorney General, an attorney for a local government, or an attorney for any agency of a local government participating in an investigation of the matter in question has been designated to appear before any court, grand jury, or state or local government or federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this Code section may deliver to such attorney such documentary material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such documentary material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this Code section, and:

(A) Any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any state or local government or federal agency involving such documentary material, has been completed; or

(B) No case or proceeding in which such documentary material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such documentary material, return to such person any such documentary material, other than copies furnished to the false claims law investigator under paragraph (2) of subsection (g) of this Code section or made for the state under subparagraph (B) of paragraph (2) of this subsection, which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) In the event of the death, disability, or separation from service of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this Code section, or in the event of the official relief of such custodian from responsibility for the custody and control of such documentary material, answers, or transcripts, the Attorney General or his or her designee shall promptly:

(A) Designate another false claims law investigator to serve as custodian of such documentary material, answers, or transcripts; and

(B) Transmit in writing to the person who produced such documentary material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such documentary material, answers, or transcripts, the same duties and responsibilities as were imposed by this Code section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(k)(1) Whenever any person fails to comply with any civil investigative demand issued under subsection (b) of this Code section, or whenever satisfactory copying or reproduction of any documentary

material requested in such demand cannot be done and such person refuses to surrender such documentary material, the Attorney General or local government may file in any county or district in which such person resides, is found, or transacts business and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2)(A) Any person who has received a civil investigative demand issued under subsection (b) of this Code section may file in the appropriate court and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the superior court for any county in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph shall be filed:

(i) Within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier; or

(ii) Within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A) of this paragraph and may be based upon any failure of the demand to comply with the provisions of this Code section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3)(A) In the case of any civil investigative demand issued under subsection (b) of this Code section which is an express demand for any product of discovery, the person from whom such discovery was obtained may file in the superior court for the county in which the proceeding in which such discovery was obtained is or was last pending and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph shall be filed:

(i) Within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier; or

(ii) Within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A) of this paragraph and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this Code section or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced by, or transcripts of oral testimony given by, any person in compliance with any civil investigative demand issued under subsection (b) of this Code section, such person and, in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file in the superior court for any county within which the office of such custodian is situated and serve upon such custodian a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this Code section.

(5) Whenever any petition is filed under this subsection in any superior court for any county, such court shall have jurisdiction to hear and determine the matter so presented and to enter such order or orders as may be required to carry out the provisions of this Code section. Any final order so entered shall be subject to appeal. Any disobedience of any final order entered under this Code section by any court shall be punished as a contempt of the court.

(6) Chapter 11 of Title 9, the "Georgia Civil Practice Act," shall apply to any petition filed in this state under this subsection, to the extent that such rules are not inconsistent with the provisions of this Code section.

(l) Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (b) of this Code section shall be exempt from disclosure under Article 4 of Chapter 18 of Title 50.

History. — Code 1981, § 23-3-125, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822; Ga. L. 2014, p. 866, § 23/SB 340; Ga. L. 2016, p. 864, § 23/HB 737.

23-3-126. Remedies nonexclusive; construction of provisions.

(a) The provisions of this article shall not be deemed exclusive, and the remedies provided for in this article shall be in addition to any other remedies provided for in any other law or available under common law.

(b) This article shall be broadly construed and applied to promote the public's interest in combating fraud and false claims directed at the public's funds.

History. — Code 1981, § 23-3-126, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822.

Code Commission notes. — Pursuant to Code Section § 28-9-5, in 2012, "This article" was substituted for "This Act" in subsection (b).

23-3-127. Proceedings involving Medicaid.

If a civil action can be commenced pursuant to Article 7B of Chapter 4 of Title 49, the "State False Medicaid Claims Act," the claimant shall proceed under Article 7B of Chapter 4 of Title 49.

History. — Code 1981, § 23-3-127, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822.

CHAPTER 4

EQUITY PROCEDURE

Article 1

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ARTICLE 1

GENERAL PROVISIONS

23-4-1. Consolidation of actions.

Where there is one common claim to be asserted by or against several, and one is asserting the claim against many, or many against one, the court may utilize equitable powers to consolidate and determine the whole matter in one action.

History. — Civil Code 1895, § 4846; Civil Code 1910, § 5419; Code 1933, § 37-1007.

Law reviews. — For article comparing sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

JUDICIAL DECISIONS

Analysis

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General Consideration

History generally. — This section appears to have been codified from the decision in Smith v. Dobbins, 87 Ga. 303, 13 S.E. 496 (1891), where it was held that where several executions are levied upon the property of the same defendant, and one person files a separate claim in resistance to each levy, such claimant is entitled to proceed in equity against all the plaintiffs in execution, where the validity of the executions all involved the same question. Dobbs v. FDIC, 187 Ga. 569, 1 S.E.2d 672 (1939).

Purpose. — This section allowing actions to be joined in order to avoid a multiplicity of suits is primarily for the convenience of parties to the case; and according to a number of authorities, whether it will be allowed is a question largely to be determined by the circumstances in the case. Lyle v. Keehn, 195 Ga. 508, 24 S.E.2d 655 (1943).

In equitable proceedings a judge of the superior court is empowered to consolidate two or more cases, in order to avoid useless consumption of the time of the court and needless expense to the taxpayers. O'Malley v. Wilson, 182 Ga. 97, 185 S.E. 109 (1936).

This section applies only where there is one common right, and one is asserting the right against many or many against one; it does not apply where there is only one party plaintiff and one party defendant. Walker Elec. Co. v. Walton, 203 Ga. 246, 46 S.E.2d 184 (1948).

Distinct and separate claims of or against different persons may not be joined in the same action, but when there is one common right to be established by or against several, equity will determine the matter as to all parties in one action. Lyle v. Keehn, 195 Ga. 508, 24 S.E.2d 655 (1943).

When there is no semblance of a conspiracy among the different defendants, and no common intent or act, this section affords no support for a multifarious petition. Crutcher v. Crawford Land Co., 220 Ga. 298, 138 S.E.2d 580 (1964).

It is not necessary or requisite that all of the issues in the cases to be consolidated are identical; they need only be substantially the same. O'Malley v. Wilson, 182 Ga. 97, 185 S.E. 109 (1936).

Neither party offers timely objection, the order of the court constitutes a final consolidation, and not a temporary consolidation "for the trial." O'Malley v. Wilson, 182 Ga. 97, 185 S.E. 109 (1936).

If neither party in the cases to be consolidated offers timely objections to the consolidation, it must be assumed that the litigants consented thereto, and they are bound thereby. O'Malley v. Wilson, 182 Ga. 97, 185 S.E. 109 (1936).

This section does not include unnecessary and even improper parties. Laken v. Sunbrand Supply Co., 214 Ga. 804, 108 S.E.2d 323 (1959).

Equity will do complete justice. — Equity, taking jurisdiction, will determine all of the matters in controversy and grant appropriate relief, equitable or legal, so as to do complete justice between the parties. City of Atlanta v. Aycock, 205 Ga. 441, 53 S.E.2d 744 (1949).

Cited in Jefferson Banking Co. v. Trustees of Martin Inst., 146 Ga. 383, 91 S.E. 463 (1917); McHenry v. McHenry, 152 Ga. 105, 108 S.E. 522 (1921); Hines v. Wilson, 164 Ga. 888, 139 S.E. 802 (1927); Jones v. Nisbet, 165 Ga. 826, 142 S.E. 164 (1928); O'Leary v. Costello, 169 Ga. 754, 151 S.E. 487 (1930); Burgess v. Ohio Nat'l Life Ins. Co., 177 Ga. 48, 169 S.E. 364 (1933); Lightner v. Belk, 178 Ga. 766, 174 S.E. 349 (1934); Swann v. Wright, 180 Ga. 323, 179 S.E. 86 (1935); Tanner v. Wilson, 183 Ga. App. 53, 187 S.E. 625 (1936); Cheatham v. Gormley, 85 Ga. App. 295, 190 S.E. 38 (1937); Ferrell v. Wight, 187 Ga. 360, 200 S.E. 271 (1938); Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939); Kimsey v. Mickel, 191 Ga. 158, 12 S.E.2d 567 (1940); Roberts v. McBrayer, 194 Ga. 606, 22 S.E.2d 165 (1942); Arnold v. West Lumber Co., 198 Ga. 207, 31 S.E.2d 410 (1944); Harris v. Rowe, 200 Ga. 265, 36 S.E.2d 787 (1946); Godfrey v. City of Cochran, 208 Ga. 149, 65 S.E.2d 605 (1951); Salter v. Salter, 209 Ga. 90, 70 S.E.2d 453 (1952); Graves v. Wall, 210 Ga. 271, 79 S.E.2d 529 (1954); Worley v. Gaston, 210 Ga. 350, 80 S.E.2d 304 (1954); Kirchman v. Kirchman, 212 Ga. 488, 93 S.E.2d 685 (1956); Chambliss v. Kindred, 214 Ga. 712, 107 S.E.2d 205 (1959);

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Dawson v. Altamaha Land Co., 215 Ga. 700, 113 S.E.2d 129 (1960); Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); Golfland, Inc. v. Thomas, 107 Ga. App. 563, 130 S.E.2d 757 (1963); Georgia Money Corp. v. Rissman, 220 Ga. 476, 139 S.E.2d 486 (1964); Logan v. Logan, 221 Ga. 769, 147 S.E.2d 326 (1966); McElmurray v. Richmond County, 223 Ga. 47, 153 S.E.2d 427 (1967); Roberts v. Roberts, 226 Ga. 203, 173 S.E.2d 675 (1970); State Farm Mut. Auto. Ins. Co. v. Hillhouse, 131 Ga. App. 524, 206 S.E.2d 627 (1974); Pugh v. Pou, 238 Ga. 450, 233 S.E.2d 198 (1977).

Proper Parties

All who have participated in an actionable wrongful act or procured it to be done are proper parties to litigation seeking relief therefrom. Hardin v. Homeyer, 213 Ga. 321, 99 S.E.2d 136 (1957).

All persons who are directly or consequentially interested in the event of the suit are properly made parties to a petition in equity, so as to prevent a multiplicity of suits by or against parties at once or successively affected by the original case. Hermann v. Mobley, 172 Ga. 380, 158 S.E. 38 (1931); Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939); Hyde v. Atlanta Woolen Mills Corp., 204 Ga. 450, 50 S.E.2d 52 (1948).

Where a principal and his surety join in the execution of a bond for faithful discharge of duty by the principal in relation to funds about to be delivered to him as next friend for a minor, and the principal receives the fund, but thereafter conveys his realty to his wife for the purpose, known to the wife, of avoiding payment to the minor, and after breach of his bond judgment is obtained against his estate, and where the surety subsequently conveys his separate realty to his daughter with intent, known to the daughter, to avoid payment to the minor, in a suit against the surety, the widow of the principal and the daughter of the surety, to recover judgment for the amount due under the bond and to subject the properties conveyed by the principal and his surety respectively to payment of the judgments, the widow and daughter are proper parties defendant, and the petition is not subject to demurrer (now motion to dismiss) by the latter on the ground of multifariousness or of misjoinder of parties. Robertson v. Cox, 183 Ga. 744, 189 S.E. 844 (1937).

It is not required that in order to be a proper party one must be interested in all the matters and issues involved in the suit. Hermann v. Mobley, 172 Ga. 380, 158 S.E. 38 (1931); Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939); Evans v. Luce, 190 Ga. 403, 9 S.E.2d 646 (1940).

There is no misjoinder of parties or of causes of action, even if the petition concerns things of a different nature against several defendants whose rights are distinct, if it sets forth one connected interest among them all, centering in the point in issue in the case. Hermann v. Mobley, 172 Ga. 380, 158 S.E. 38 (1931); City of Atlanta v. Aycock, 205 Ga. 441, 53 S.E.2d 744 (1949).

An equitable petition is not multifarious because all of the defendants are not interested in all of the matters contained in the suit; it is sufficient if each party has an interest in some matter in the suit which is common to all, and that they are connected with the others. Dobbs v. FDIC, 187 Ga. 569, 1 S.E.2d 672 (1939); Hyde v. Atlanta Woolen Mills Corp., 204 Ga. 450, 50 S.E.2d 52 (1948).

Common right as to partnership. — When there is a common right, such as the right of partners to the partnership property, equity will take jurisdiction in order to avoid separate suits by or against each partner. Fowler v. Stansell, 221 Ga. 630, 146 S.E.2d 726 (1966).

For a party seeking to obtain possession of a disputed tract of land to join a third party assenting a superior claim to possession, it is not necessary that the interest of the parties be identical; the test is the common interest in the subject matter of the litigation, the property of which the plaintiff seeks to be put in possession, and the common interest of each of the defendants is to defeat that effort of the plaintiff and have possession for himself. Voyles v. Federal Land Bank, 182 Ga. 569, 186 S.E. 405 (1936).

When petition asserted as to all defendants that the property conveyed to them by the principal defendant was without any legal consideration and purchased with funds stolen from the petitioner, the issue as to that question was common to all of the defendants, and the petition was not subject to the grounds of special demurrer (now motion to dismiss) as to misjoinder of parties and causes of action and multifariousness. Hyde v. Atlanta Woolen Mills Corp., 204 Ga. 450, 50 S.E.2d 52 (1948).

When the plaintiffs have a common interest against all of the defendants in a suit as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstance of some of the defendants being subject to distinct liabilities in respect to different branches of the subject matter, will not render the bill multifarious. Myers v. Grant, 212 Ga. 677, 95 S.E.2d 9 (1956).

Application to members of unincorporated association. — Under this rule, a few of the members of an unincorporated association, such as a trade union, may sue in the name or in behalf of all the members, where all by virtue of their membership have a common right or interest in the contract or other subject matter of the suit. The fact that the individual interests of the plaintiffs may in some respects differ, or that all do not have an interest in all the matters embraced in such an equitable suit, will not, as to individual plaintiffs, render the petition multifarious or subject to attack for misjoinder of parties or causes of action, if each of the plaintiffs has an essential interest common to all, with a common connection and right against the defendant. O'Jay Spread Co. v. Hicks, 185 Ga. 507, 195 S.E. 564 (1938).

Dismissal based on multifariousness. — A suit in equity, based on separate and distinct claims against different persons, where there is no common right to be established, will be dismissed on demurrer (now motion to dismiss) on the ground of multifariousness. McCowan v. Snook, 175 Ga. 430, 165 S.E. 84 (1932).

No right of consolidation. — Where no common right or interest is shown, the alleged insolvency of the defendant in the petition for consolidation will not confer a right of consolidation in the plaintiffs. Walker Elec. Co. v. Walton, 201 Ga. 591, 40 S.E.2d 523 (1946).

The fact that the individual interests of the plaintiffs may in some respects differ, or that all do not have an interest in all the matters embraced in such an equitable suit, will not, as to individual plaintiffs, render the petition multifarious or subject to attack for misjoinder of parties or causes of action, if each of the plaintiffs has an essential interest common to all, with a common connection and right against the defendant. City of Atlanta v. Aycock, 205 Ga. 441, 53 S.E.2d 744 (1949).

Holding stocks does not necessarily create common interest. — The fact that two defendants are large stockholders in a company seeking to consolidate their cases does not give them such a common interest in the result of the litigation against the corporation as would authorize the consolidation of suits against each of them as individuals with suits against the corporation. Walker Elec. Co. v. Walton, 201 Ga. 591, 40 S.E.2d 523 (1946).

Petition seeking cancellation of a security deed and injunction against a sale under power contained therein, alleging that the debt which the deed was given to secure had been paid, brought by the administratrix of the estate of the grantor in the deed, a holder of a lien junior to the security deed, the owner of a one-half undivided interest in the lands therein conveyed, of whose interest the defendant grantee had notice at the time the deed was executed, was sufficient to set forth a cause of action for the relief prayed for as against a general demurrer (now subject to motion to dismiss), and was not demurrable (now motion to dismiss) on the ground of multifariousness, or of misjoinder of parties plaintiff, or that the interests of the plaintiffs were antagonistic and divergent as all the plaintiffs had an interest in the realty, and a common interest in seeking to enjoin a sale thereof and cancellation of the deed thereto. Perry v. Gormley, 183 Ga. 757, 189 S.E. 850 (1937).

Proceedings based on void Acts of General Assembly. — There is no

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misjoinder of causes of action or of parties plaintiff, and the petition is not multifarious, where the property rights of all the petitioners are affected by the defendants' attempt to condemn the plaintiff's property and by the acts of the defendants, who are alleged to be proceeding under a void Act of the General Assembly, and an unconstitutional, illegal, and void ordinance enacted by the defendant city pursuant to the powers purported to be conferred by the Act. City of Atlanta v. Aycock, 205 Ga. 441, 53 S.E.2d 744 (1949).

Joinder of city and railroad company. — In view of the interest and general authority of a city to protect its streets and keep them free of obstructions, where separate acts of the railroad company and of the city have the effect to destroy an existing street as a continuous way, the railroad company and the city can be joined in one action for mandamus to compel each to remove the obstructions made by it. Such an action does not show a joinder of separate and distinct claims against different parties. Atlantic Coast Line R.R. v. Donalsonville Grain & Elevator Co., 184 Ga. 291, 191 S.E. 87 (1937).

Order of court consolidating suit by heirs at law, and suit by creditors, was not erroneous merely because of differences in the parties and in the relief sought, there being at least one matter common to both suits, in which all of the parties to each suit asserted interest, and a common relation of all contentions to the same estate. Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939).

Jurisdiction Generally

Equitable jurisdiction requires common issue. — Before equity will assume jurisdiction to enjoin the bringing of multiple suits, the same issue must be involved in each of the suits. Reed v. V.H. Kriegshaber & Son, 171 Ga. 352, 155 S.E. 469 (1930).

Pleading and Practice

General test, in determining whether cases can be consolidated or whether an equity suit will lie to enjoin an action at law and try its issues in the equity suit, is whether the two suits could have been joined in one petition; and this depends on whether a misjoinder or multifariousness would result. Sanders v. Wilson, 193 Ga. 393, 18 S.E.2d 765 (1942).

A petition is multifarious when it embraces two or more claims by separate and distinct parties against separate and distinct parties, and where there is no common right to be established. Saliba v. Saliba, 202 Ga. 279, 42 S.E.2d 748 (1947); Burgin Lumber Co. v. Kirksey, 203 Ga. 439, 47 S.E.2d 68 (1948).

Where a petition should have been dismissed in the lower court for improper joinder and for multifariousness, the appellate court will not rule upon the merits of the several claims set forth in the petition, because it would be possible for a plaintiff to include in one action a multitude of disconnected claims against as many separate persons, and thus procure a decision upon the merits of each, and in effect avoid the rule against joining in one action separate claims against separate persons. Burgin Lumber Co. v. Kirksey, 203 Ga. 439, 47 S.E.2d 68 (1948).

Equity not controlling if misjoinder or multifariousness results. — Even though under this section equity might reach out and bring in as parties persons not already joined, it will not do so if a misjoinder or multifariousness would result. Such would be the result if separate claims with different issues would have to be determined. Sanders v. Wilson, 193 Ga. 393, 18 S.E.2d 765 (1942).

When strict application of rules against multifariousness required. — Where there are two actions at law, brought by separate plaintiffs, to recover damages ex delicto, in which neither party has a joint interest with the other, and a person who is a defendant in both actions at law seeks to convert one of them into an equitable suit on the sole ground of avoiding multiplicity, the rules against multifariousness are more strictly applied to deny the joinder. Sanders v. Wilson, 193 Ga. 393, 18 S.E.2d 765 (1942).

Issuance of an order of consolidation is a matter within the sound legal discretion of the judge, and the exercise of this discretion will not be dis-

turbed, unless manifestly abused. O'Malley v. Wilson, 182 Ga. 97, 185 S.E. 109 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 46 et seq., 248. 59 Am. Jur. 2d, Parties, §§ 3, 96.

C.J.S. — 1 C.J.S., Actions, § 107 et seq. 30 C.J.S., Equity, § 68. 31 C.J.S., Equity, § 133 et seq. 67A C.J.S., Parties, § 4.

ALR. — Joinder of parties or causes of action in suits under the Federal Employers' Liability Act, 13 A.L.R. 159.

Right to enjoin enforcement of illegal tax, local assessment, or license fee, upon joinder of several affected thereby, 32 A.L.R. 1266; 156 A.L.R. 319.

Power of equity to enjoin prosecution of independent actions at law by different persons injured by the same tort, 75 A.L.R. 1444.

Remaindermen as necessary or proper parties to action or proceeding between life tenant and trustee, 136 A.L.R. 696.

Joinder or representation of several claimants in action against carrier or utility to recover overcharge, 1 A.L.R.2d 160.

Appealability of state court order granting or denying consolidation, severance, or separate trials, 77 A.L.R.3d 1082.

23-4-2. How extraordinary remedies claimed.

A claim for extraordinary relief or remedy to aid an action or defense may be asserted either by original pleading or by amendment.

History. — Ga. L. 1887, p. 64, § 4; Civil Code 1895, § 4839; Civil Code 1910, § 5412; Code 1933, § 37-907.

JUDICIAL DECISIONS

Purpose of section. — The purpose of this section is to vest in the superior court authority to settle in one suit a controversy between parties. Clay v. Smith, 207 Ga. 610, 63 S.E.2d 602 (1951).

A defendant who fails to set up a legal or equitable defense is bound thereby and cannot afterwards bring an equitable petition to enjoin his adversary. McCall v. Fry, 120 Ga. 661, 48 S.E. 200 (1904); Graham v. Graham, 137 Ga. 668, 74 S.E. 426 (1912); Liberty Lumber Co. v. Enecks, 23 Ga. App. 311, 98 S.E. 97 (1919).

Cited in Biddle v. Papa, 180 Ga. 468, 179 S.E. 357 (1935); Hamilton v. First Nat'l Bank, 180 Ga. 820, 180 S.E. 840 (1935); Tanner v. Wilson, 183 Ga. App. 53, 187 S.E. 625 (1936); Winn v. Armour & Co., 184 Ga. 769, 193 S.E. 447 (1937); Harrell v. Parker, 186 Ga. 760, 198 S.E. 776 (1938); Hicks v. Atlanta Trust Co., 187 Ga. 314, 200 S.E. 301 (1938); Pardue Medicine Co. v. Pardue, 194 Ga. 516, 22 S.E.2d 143 (1942); Cohen v. Cohen, 200 Ga. 33, 35 S.E.2d 908 (1945); Hoxie v. Americus Auto. Co., 73 Ga. App. 686, 37 S.E.2d 808 (1946); Parnell v. Wooten, 202 Ga. 443, 43 S.E.2d 673 (1947); Georgia Power Co. v. Mayor of Athens, 206 Ga. 513, 57 S.E.2d 573 (1950); Echols v. Thompson, 210 Ga. 37, 77 S.E.2d 521 (1953); Brown v. Granite Holding Corp., 221 Ga. 560, 146 S.E.2d 289 (1965).

RESEARCH REFERENCES

ALR. — By whom writ of assistance issued, 21 A.L.R. 358.

23-4-3. Claim of legal and equitable relief by defendant.

A defendant to any action in the superior court or in the Georgia State-wide Business Court, whether the action is for legal or equitable relief, may claim legal or equitable relief, or both, by framing proper pleadings for that purpose and sustaining them by sufficient evidence.

History. — Ga. L. 1884-85, p. 36, § 2; Civil Code 1895, § 4837; Civil Code 1910, § 5410; Code 1933, § 37-905; Ga. L. 2019, p. 845, § 3-5/HB 239.

The 2019 amendment, effective May 7, 2019, inserted "or in the Georgia State-wide Business Court" in the middle of this Code section.

Law reviews. — For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 1 (2019).

JUDICIAL DECISIONS

Effect of suit in superior court. — When a plaintiff sues a defendant in the superior court, the policy of the law requires the controversy growing out of the cause of action alleged by the plaintiff to be settled in that suit. Hamilton v. First Nat'l Bank, 180 Ga. 820, 180 S.E. 840 (1935); Brewer v. Williams, 210 Ga. 341, 80 S.E.2d 190 (1954).

An ancillary petition may be filed after as well as before a decree to enable a court of equity to effectuate its own decree by ordering one put in possession of property where entitled thereto under its original decree, in order to avoid the further litigation of questions once settled between the same parties. Voyles v. Federal Land Bank, 182 Ga. 569, 186 S.E. 405 (1936).

After an ancillary petition seeking possession of property is filed, the court may, on application in a proper case, cause other parties to be made, where they are asserting some rights affecting the property and while a claimant in possession may not be subject to summary dispossession by the sheriff under the warrant sued out, the court of equity has authority, under its broad powers, to make the claimant a party in order to settle the rights of all parties in one action, without remitting the petitioner in the ancillary proceeding to a common-law action of ejectment. Voyles v. Federal Land Bank, 182 Ga. 569, 186 S.E. 405 (1936).

Claims arising ex contractu cannot be set off against claims arising ex delicto, except upon equitable grounds. Brewer v. Williams, 210 Ga. 341, 80 S.E.2d 190 (1954).

Since plaintiffs' petition seeking to enjoin the defendant from the commission of an alleged tort in cutting and removing timber was not an action in tort or ex delicto, but an equitable proceeding, defendant was not only entitled but bound to set up all defenses that he had to the suit, either legal or equitable, and to pray for all relief needed in aid thereof, ordinary or extraordinary. Brewer v. Williams, 210 Ga. 341, 80 S.E.2d 190 (1954).

Cited in Malsby v. Young, 104 Ga. 205, 30 S.E. 854 (1898); McCall v. Fry, 120 Ga. 661, 48 S.E. 200 (1904); Shorter v. Shorter, 150 Ga. 109, 102 S.E. 863 (1920); Kirkpatrick v. Coates, 154 Ga. 643, 115 S.E. 103 (1922); O'Leary v. Costello, 169 Ga. 754, 151 S.E. 487 (1930); Tanner v. Wilson, 183 Ga. App. 53, 187 S.E. 625 (1936); Winn v. Armour & Co., 184 Ga. 769, 193 S.E. 447 (1937); Hicks v. Atlanta Trust Co., 187 Ga. 314, 200 S.E. 301 (1938); Ellis v. Millen Hotel Co., 192 Ga. 66, 14 S.E.2d 565 (1941); Georgia Power Co. v. Mayor of Athens, 206 Ga. 513, 57 S.E.2d 573 (1950); Earney v. Owen, 213 Ga. 412, 99 S.E.2d 201 (1957); Travelers Indem. Co. v. Callaway, 215 Ga. 684, 113 S.E.2d 136 (1960); Ogletree v. Cathrall, 110 Ga. App. 100, 137 S.E.2d 799 (1964); Georgia Money Corp. v. Rissman, 220 Ga. 476, 139 S.E.2d 486 (1964); Kiser v. Georgia Power Co., 126 Ga. App. 551, 191 S.E.2d 311 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 19, 194 et seq.
C.J.S. — 31 C.J.S., Equity, § 258 et seq.
ALR. — Inclusion in bill for divorce or annulment of allegations and prayer to impress trust upon property or otherwise settle property rights, 93 A.L.R. 327.

23-4-4. Proceedings ex parte or in execution of protective powers; petition.

All ex parte proceedings or proceedings for the execution of the protective powers of equity over trust estates or the estates of wards of equity shall be initiated by presenting a petition to the court. The court may order such other proceedings as the necessity of each case demands.

History. — Orig. Code 1863, § 4130; Code 1868, § 4162; Code 1873, § 4221; Code 1882, § 4221; Civil Code 1895, § 4863; Civil Code 1910, § 5436; Code 1933, § 37-1301.

JUDICIAL DECISIONS

Ex parte proceedings generally. — Where the beneficiary of a trust has been adjudged incompetent, and is not capable of giving his valid consent to the conveyance of property which has been placed in trust for him prior to his becoming incompetent, and which may be conveyed by the trustee with his consent, a court of equity, in the exercise of its broad, comprehensive, and plenary jurisdiction of trusts and the estates of wards of chancery, may make the election for such incompetent, and authorize the trustee to convey the property. Gilmore v. Gilmore, 208 Ga. 245, 65 S.E.2d 813 (1951); Rockefeller v. First Nat'l Bank, 213 Ga. 493, 100 S.E.2d 279 (1957).

Cited in Marshall v. Citizens & S. Nat'l Bank, 54 Ga. App. 123, 187 S.E. 240 (1936); Mize v. Harber, 189 Ga. 737, 8 S.E.2d 1 (1940); Humber v. Garrard, 205 Ga. 357, 53 S.E.2d 748 (1949); Rockefeller v. First Nat'l Bank, 213 Ga. 493, 100 S.E.2d 279 (1957); Rockefeller v. First Nat'l Bank, 154 F. Supp. 122 (S.D. Ga. 1957); Murphy v. Murphy, 214 Ga. 602, 106 S.E.2d 280 (1958); Weatherly v. Citizens & S. Nat'l Bank, 222 Ga. 312, 149 S.E.2d 688 (1966).

RESEARCH REFERENCES

ALR. — Ex parte appointment of receiver for partnership, 169 A.L.R. 1127.

23-4-5. Receipt of and action on petition; transmittal of proceedings to clerk.

The judge may receive and act upon the petitions described in Code Section 23-4-4 at chambers, always transmitting the entire proceedings to the clerk to be entered on the minutes or other records of the court.

History. — Ga. L. 1853-54, p. 59, § 1; Code 1863, § 4131; Code 1868, § 4163; Code 1873, § 4222; Code 1882, § 4222; Civil Code 1895, § 4864; Civil Code 1910, § 5437; Code 1933, § 37-1302.

JUDICIAL DECISIONS

Cited in Brinkley v. Buchanan, 55 Ga. 342 (1875); Iverson v. Saulsbury, Respess & Co., 68 Ga. 790 (1882); Warren v. Bunch, 80 Ga. 124, 7 S.E. 270 (1887); Chapman v. Chattooga Oil Mill Co., 22 Ga. App. 446, 96 S.E. 579 (1918); Mize v. Harber, 189 Ga. 737, 8 S.E.2d 1 (1940); Humber v. Garrard, 205 Ga. 357, 53 S.E.2d 748 (1949).

ARTICLE 2

PARTIES

23-4-20. Who may complain in equity.

Any person who may not bring an action at law may complain in equity and every person who is remediless elsewhere may claim the protection and assistance of equity to enforce any right recognized by the law.

History. — Orig. Code 1863, § 4090; Code 1868, § 4119; Code 1873, § 4178; Code 1882, § 4178; Civil Code 1895, § 4841; Civil Code 1910, § 5414; Code 1933, § 37-1001.

JUDICIAL DECISIONS

History of section generally. — See McHenry v. McHenry, 152 Ga. 105, 108 S.E. 522 (1921).

Minor children may bring wrongful death action. — After a surviving spouse abandoned the minor children and could not be found, the factual circumstances demand the exercise of the court's equitable powers to preserve the rights of the minor children. The trial court should have allowed these minors, who have no remedy at law, to maintain an action for the wrongful death of their mother. Brown v. Liberty Oil & Ref. Corp., 261 Ga. 214, 403 S.E.2d 806 (1991).

Whoever has an interest in the decree sought should be made a party, if it is practicable. Swift & Co. v. First Nat'l Bank, 161 Ga. 543, 132 S.E. 99 (1926); Waters v. Waters, 167 Ga. 389, 145 S.E. 460 (1928).

Cited in Henderson v. Napier, 107 Ga. 342, 33 S.E. 433 (1899); Railroad Comm'n v. Palmer Hdwe. Co., 124 Ga. 633, 53 S.E. 193 (1906); Globe & Rutgers Fire Ins. Co. v. Salvation Army, 177 Ga. 890, 172 S.E. 33 (1933); Jackson v. Massachusetts Mut. Life Ins. Co., 183 Ga. 659, 189 S.E. 243 (1936); Federal Land Bank v. Forrester, 192 Ga. 446, 15 S.E.2d 517 (1941); Lumbermens Mut. Cas. Co. v. Moody, 116 Ga. App. 2, 156 S.E.2d 117 (1967); Ga. Home Appraisers, Inc. v. Trintec Portfolio Servs., LLC, 349 Ga. App. 356, 825 S.E.2d 833 (2019).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 120 et seq.

C.J.S. — 31 C.J.S., Equity, § 133 et seq.

ALR. — Constitutionality of statute

conferring on chancery courts power to abate public nuisance, 22 A.L.R. 542, 75 A.L.R. 1298.

Equity jurisdiction for cancellation of insurance policy upon ground within incontestable clause prior to termination of period, 73 A.L.R. 1529; 111 A.L.R. 1275.

ARTICLE 3

DECREES

23-4-30. Nature of decree; signature and entry.

A decree is the judgment of the judge in equitable proceedings upon the facts ascertained and should be signed by him and entered on the minutes of the court.

History. — Orig. Code 1863, § 4122; Code 1868, § 4153; Code 1873, § 4212; Code 1882, § 4212; Civil Code 1895, § 4851; Civil Code 1910, § 5424; Code 1933, § 37-1201.

Cross references. — Verdict and judgment generally, T. 9, C. 12.

JUDICIAL DECISIONS

A decree is the judgment or sentence of a proceeding instituted in a court of equity. Loyd, Perryman & Mills v. Hicks, 31 Ga. 140 (1860).

A return by appraisers is not a decree because it is not "the judgment of the judge." Brackett v. Allison, 119 Ga. App. 632, 168 S.E.2d 611 (1969).

Decree should conform to the law. — When there is an error of law apparent on the face of the auditor's report, wholly irrespective of the evidence on which it is based, the judge in framing his decree should correct any error of law apparent on the face of the report, and make his decree conform to the law. Owen v. S.P. Richards Paper Co., 188 Ga. 258, 3 S.E.2d 660 (1939).

A decree must follow the verdict upon which it is founded; but this principle does not require that no decree be rendered unless the verdict contains all the facts upon which it is founded. A decree should follow the finding of facts found by a special verdict; but, while the judge in rendering the decree cannot go contrary to the facts found in a special verdict, he may examine the pleadings, admissions made by the parties, and all undisputed facts. In the absence of anything to the contrary, it will be presumed that the judge was authorized by the pleadings, admissions made by the parties, or by the undisputed evidence, to enter the decree which he rendered. Gray v. Junction City Mfg. Co., 195 Ga. 33, 22 S.E.2d 847 (1942); Allen v. Allen, 198 Ga. 269, 31 S.E.2d 483 (1944).

In proceedings for equitable relief, it is the duty of the judge to submit such issues as will enable him to make a decree from the verdict, the pleadings and the undisputed facts. Allen v. Allen, 198 Ga. 269, 31 S.E.2d 483 (1944).

Only such questions need be put to the jury as will enable them fully to find the facts in issue and not admitted by the pleadings. Allen v. Allen, 198 Ga. 269, 31 S.E.2d 483 (1944).

The construction of an ambiguous decree made by the judge who granted it is conclusive. G.S. Baxter & Co. v. Camp, 129 Ga. 460, 59 S.E. 283 (1907).

Cited in Seay v. Treadwell, 43 Ga. 564 (1871); Webster v. Dundee Mtg. & Trust Co., 93 Ga. 278, 20 S.E. 310 (1893); Carstarphen v. Holt, 96 Ga. 703, 23 S.E. 904 (1895); Crosby v. Pittman, 129 Ga. 537, 59 S.E. 279, 121 Am. St. R. 234

(1907); Winn v. Walker, 147 Ga. 427, 94 S.E. 468 (1917); Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939); Peppers v. Peppers, 194 Ga. 10, 20 S.E.2d 409 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 245 et seq.

C.J.S. — 31 C.J.S., Equity, § 581.

23-4-31. Power of court to mold and enforce decrees.

A superior court shall have full power to mold its decrees so as to meet the exigencies of each case and shall have full power to enforce its decrees when rendered.

History. — Orig. Code 1863, § 4123; Code 1868, § 4154; Code 1873, § 4213; Code 1882, § 4213; Civil Code 1895, § 4853; Civil Code 1910, § 5426; Code 1933, § 37-1203.

Law reviews. — For article comparing sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

JUDICIAL DECISIONS

Decree may be partly final and partly interlocutory; final as to its determination of all issues of law and fact, and interlocutory as to its mode of execution. Johnson v. James, 246 Ga. 680, 272 S.E.2d 692 (1980).

A final decree disposing of all the substantial equities of the case is not made interlocutory by the mere reservation of the right to direct the mode of its execution. Johnson v. James, 246 Ga. 680, 272 S.E.2d 692 (1980).

Judgment of the court should conform to the reasonable intendment of the verdict upon which it is based. McGill v. McGill, 247 Ga. 428, 276 S.E.2d 587 (1981).

Decree of a court of equity must in every case follow the verdict, and may not embrace questions which the verdict does not cover. Burke v. Wilkins, 49 Ga. 257 (1873); Hall v. Huff, 80 Ga. 31, 5 S.E. 49 (1887); Gray v. Junction City Mfg. Co., 195 Ga. 33, 22 S.E.2d 847 (1942).

Decree may be molded to meet exigencies of the case. — After a jury returns a general verdict finding a nuisance exists, the trial court is authorized to mold its decree so as to meet the exigencies of the case and the prayers of the plaintiffs. Tufts v. DuBignon, 61 Ga. 322 (1878); Parnell v. Wooten, 202 Ga. 443, 43 S.E.2d 673 (1947); City of Cordele v. Hobby, 240 Ga. 207, 240 S.E.2d 16 (1977); Cotts v. Cotts, 245 Ga. 138, 263 S.E.2d 163 (1980).

Trial court was entitled to enter an order molding the verdict in continuing a nuisance case pursuant to O.C.G.A. § 23-4-31, as doing so was necessary to meet the exigencies of the case and the prayers of the landowners, and the order entered three months after judgment did not modify the judgment in any matter of substance not contemplated by the parties at the time the judgment was entered. City of Columbus v. Barngrover, 250 Ga. App. 589, 552 S.E.2d 536 (2001).

Enforcement order proper. — Trial court did not abuse its broad discretion in balancing the equities and entering a second order requiring conveyance of property in exchange for payment of the sum determined in its original order, plus interest, and refusing to order either party to reimburse the other for taxes, maintenance, or rental value related to the property. Nowlin v. Davis, 278 Ga. 240, 599 S.E.2d 128 (2004).

Enforcement of divorce decree not an impermissible modification. — Trial court's order requiring a husband to return to the wife items of jewelry which were not mentioned in the original decree

was not an impermissible modification of the decree but an enforcement of a settlement agreement reached between the parties themselves, as permitted by the decree, which the court could enforce under O.C.G.A. § 23-4-31. Doritis v. Doritis, 294 Ga. 421, 754 S.E.2d 53 (2014).

Manner of enforcement of decree is within discretion of judge. — In molding a decree upon the jury's verdict upon the facts, the chancellor (now judge) has a very broad discretion in determining what steps shall be taken to secure the enforcement of the rights awarded by the verdict, to the end that equity may afford adequate and complete relief, and this discretion will not in any case be controlled unless it is manifest there has been an abuse of discretion in a material matter. Bank of Tupelo v. Collier, 191 Ga. 852, 14 S.E.2d 59 (1941); Bregman v. Rosenthal, 212 Ga. 95, 90 S.E.2d 561 (1955).

An order entered by the trial court after appeal was not an impermissible modification of a final judgment, where the second decree became necessary only because the owner refused to obey the first decree. Gallogly v. Bradco, Inc., 260 Ga. 311, 392 S.E.2d 529 (1990).

Out-of-term modification of order not permitted. — Where the trial court's order is final in that the case is no longer pending in the trial court, the trial court lacks authority, in a succeeding term, to modify that order so as to relieve parties from their duty of compliance. Cobb County v. Buchanan, 261 Ga. 854, 413 S.E.2d 198 (1992).

Creation of trust for child support effectuated jury's intent. — Where, in a divorce case, the jury clearly intended to create a trust for the purpose of providing support for the minor child during his minority and they also intended that there be monthly payments from the trust for the use of the child, but the husband failed to take any substantive steps to set up the trust, there was no error in the trial court naming a trustee and providing the necessary provisions to effectuate the trust for the purpose of providing monthly child support, such as requiring the husband to make the payments necessary to keep current on his obligations for his share of the debts, encumbrances and maintenance of the trust property. Aycock v. Aycock, 251 Ga. 104, 303 S.E.2d 456 (1983).

Cited in Wade v. Peacock, 121 Ga. 816, 49 S.E. 826 (1905); Swift & Co. v. First Nat'l Bank, 161 Ga. 543, 132 S.E. 99 (1926); Gore v. Humphries, 163 Ga. 106, 135 S.E. 481 (1926); Watters v. Southern Brighton Mills, 168 Ga. 15, 147 S.E. 87 (1929); Holst v. City of La Grange, 175 Ga. 402, 165 S.E. 217 (1932); Westberry v. Reddish, 178 Ga. 116, 172 S.E. 10 (1933); Jarecky v. Arnold, 51 Ga. App. 954, 182 S.E. 66 (1935); Kirk v. Bray, 181 Ga. 814, 184 S.E. 733 (1935); Snyder v. Elkan, 187 Ga. 164, 199 S.E. 891 (1938); Payne v. Home Sav. Bank, 193 Ga. 406, 18 S.E.2d 770 (1942); Hughes v. Cobb, 195 Ga. 213, 23 S.E.2d 701 (1942); Johnson v. Wilson, 212 Ga. 264, 91 S.E.2d 758 (1956); G.S. & M. Co. v. Dixon, 220 Ga. 329, 138 S.E.2d 662 (1964); Moon v. Moon, 222 Ga. 650, 151 S.E.2d 714 (1966); Bradley v. Bradley, 233 Ga. 83, 210 S.E.2d 1 (1974); Brown v. Techdata Corp., 238 Ga. 622, 234 S.E.2d 787 (1977); Gorman v. Gorman, 239 Ga. 312, 236 S.E.2d 652 (1977); Golden v. Frazier, 244 Ga. 685, 261 S.E.2d 703 (1979); Holman v. Ruesken, 246 Ga. 557, 272 S.E.2d 292 (1980); Hudson v. Hudson, 258 Ga. 692, 373 S.E.2d 372 (1988); Getman v. Ackerly, 259 Ga. 534, 384 S.E.2d 651 (1989); Hirsh v. City of Atlanta, 261 Ga. 22, 401 S.E.2d 530 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 251.

C.J.S. — 30 C.J.S., Equity, § 12. 31 C.J.S., Equity, § 612 et seq.

ALR. — Constitutionality of statute conferring on chancery courts power to abate public nuisance, 22 A.L.R. 542; 75 A.L.R. 1298.

Power of equity to require acceptance of damages in lieu of injunctive relief asked, 105 A.L.R. 1381.

23-4-32. Decree affecting property outside jurisdiction.

Equity may decree in cases of fraud, trust, or contract, although property not within the jurisdiction may be affected by the decree.

History. — Civil Code 1895, § 4854; Civil Code 1910, § 5427; Code 1933, § 37-1204.

History of Code section. — This Code section is derived from the decision in Engel v. Scheuerman, 40 Ga. 206 (1869).

JUDICIAL DECISIONS

Effect of decree affecting out-of-state property generally. — Petition charging that defendant husband was seeking to place his property where it could not be reached by his wife (his judgment creditor) presented a situation where upon proof a court of equity could grant prayers for setting aside alleged fraudulent conveyance and transfer to out-of-state resident, as well as alleged fraudulent claims of lien for attorneys' fees, and for appointment of a receiver to take charge of defendant's assets and under the direction of the court sell enough to pay the petitioner the amount now due under her two judgments. Peoples Loan Co. v. Allen, 199 Ga. 537, 34 S.E.2d 811 (1945).

Petition brought against a judgment debtor and other defendants, alleging that they entered into a conspiracy in bad faith to hinder, delay, or defraud the petitioner in the collection of her two judgments, and that in pursuance of such conspiracy various properties of the judgment debtor were secreted and fraudulent conveyances were made, with the result that the property of the judgment debtor in this state not so concealed or conveyed was insufficient to discharge the amount due under the two judgments, and seeking to set aside such fraudulent conveyances and the appointment of a receiver and other relief, stated a cause of action against the four defendants. Peoples Loan Co. v. Allen, 199 Ga. 537, 34 S.E.2d 811 (1945).

Jurisdiction. — When a case is a proper one in other respects for equitable relief independent of statute, an obligation can be enforced wherever defendant is personally within the jurisdiction of the court, although land lying in another state may be affected by the decree and in such cases the court does not act upon the land, or make any order in reference to it; it simply declares a certain transaction relating to the land fraudulent, as between the complainant and the offending parties, and thus removes it as an obstruction to the creditor's legal remedy. Dodd v. Bell, 180 Ga. 313, 178 S.E. 663 (1935).

Once jurisdiction, power of court to act. — When a court of equity has jurisdiction of the person of a defendant, it may decree the specific performance of a contract for the conveyance of land situated in a foreign state or country, and also restrain a defendant by injunction in certain specified cases, by acting upon the person of the defendant within its jurisdiction. Dodd v. Bell, 180 Ga. 313, 178 S.E. 663 (1935).

Cited in Georgia S. & F.R.R. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 21 S.E. 701, 47 Am. St. R. 153, 32 L.R.A. 208 (1894).

RESEARCH REFERENCES

ALR. — Decree in suit by judgment creditor to set aside conveyance in fraud of creditors as bar to another suit for same purpose in respect of another conveyance, 108 A.L.R. 699.

Consent decree as affecting title to real estate in another state, 2 A.L.R.2d 1188.

Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service, and appearance, 15 A.L.R.2d 610.

23-4-33. Decree in will or contract matters; consent of guardian or guardian ad litem.

When it becomes impossible to carry out any last will and testament in whole or in part, and in all matters of contract, the judges of the superior courts, and the judge of the Georgia State-wide Business Court in matters of contract only, shall have power to render any decree that may be necessary and legal, provided that all parties in interest shall consent thereto in writing and there shall be no issue as to the facts or, if there is such an issue, that there shall be a like consent in writing that the judge presiding may hear and determine such facts, subject to a review on appeal, as in other cases. In all cases where minors are interested, the consent of the guardian at law or the guardian ad litem shall be obtained before the decree is rendered.

History. — Ga. L. 1865-66, p. 221, § 1; Code 1868, § 4155; Code 1873, § 4214; Code 1882, § 4214; Ga. L. 1882-83, p. 69, § 1; Civil Code 1895, § 4855; Civil Code 1910, § 5428; Code 1933, § 37-1205; Ga. L. 2016, p. 883, § 3-8/HB 927; Ga. L. 2019, p. 845, § 3-6/HB 239.

The 2019 amendment, effective May 7, 2019, inserted ", and the judge of the Georgia State-wide Business Court in matters of contract only," in the middle of the first sentence of this Code section.

Editor's notes. — Ga. L. 2016, p. 883, § 1-2/HB 927, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Appellate Jurisdiction Reform Act of 2016.'"

Ga. L. 2016, p. 883, § 6-1/HB 927, not codified by the General Assembly, provides that: "Part III of this Act shall become effective on January 1, 2017, and shall apply to cases in which a notice of appeal or application to appeal is filed on or after such date."

Law reviews. — For article on the 2016 amendment of this Code section, see 33 Georgia St. U.L. Rev. 205 (2016). For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 1 (2019).

JUDICIAL DECISIONS

Judge determines the question of impossibility of carrying out a will. Sharp v. Findley, 71 Ga. 654 (1883).

Cited in Summerour v. Fortson, 174 Ga. 862, 164 S.E. 809 (1932); Sims v. Ramsey, 186 Ga. 732, 198 S.E. 770 (1938); Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

RESEARCH REFERENCES

C.J.S. — 31 C.J.S., Equity, § 588.

23-4-34. Interlocutory decrees and orders.

At any stage in the progress of an action seeking equitable relief, if any portion of the same is ready for or requires a decree, the court may hear and determine such matters and pass such interlocutory decree or order as may advance the cause and expedite a final hearing. If no issue of fact is involved, the verdict of a jury shall be unnecessary.

History. — Orig. Code 1863, § 4111; Code 1868, § 4142; Code 1873, § 4201; Code 1882, § 4201; Civil Code 1895, § 4847; Civil Code 1910, § 5420; Code 1933, § 37-1101.

Cross references. — Special verdicts in civil cases, § 9-11-49.

Law reviews. — For article, "Injunction Procedure in Georgia," see 13 Ga. B.J. 300 (1951). For article surveying development of equity and the right to trial by jury in equity actions in Georgia, and advocating use of jury to try issues of fact in equitable actions, see 8 Mercer L. Rev. 225 (1957). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

JUDICIAL DECISIONS

A decree may be partly final and partly interlocutory; final as to its determination of all issues of law and fact and interlocutory as to its mode of execution. Moody v. Muscogee Mfg. Co., 134 Ga. 721, 68 S.E. 604, 20 Ann. Cas. 301 (1910); Johnson v. James, 246 Ga. 680, 272 S.E.2d 692 (1980).

A final decree disposing of all the substantial equities of the case is not made interlocutory by reservation of the right to direct the mode of its execution. Moody v. Muscogee Mfg. Co., 134 Ga. 721, 68 S.E. 604, 20 Ann. Cas. 301 (1910); Johnson v. James, 246 Ga. 680, 272 S.E.2d 692 (1980).

Control of interlocutory decree. — An interlocutory decree is under the control of the judge until the final hearing. Howard v. Lowell Mach. Co., 75 Ga. 325 (1885).

Reopening decree. — An interlocutory decree fixing the plan of settlement to creditors, on a petition to wind up affairs of a building and loan association may be made with an order therein that it may be reopened for adjudication of rights and liabilities of subsequent parties. Goodrich v. City Loan & Bldg. Ass'n, 54 Ga. 98 (1875).

Judges' powers in this state are similar to those as were exercised in England. Jones v. Dougherty, 10 Ga. 273 (1851).

Correction of error in auditor's conclusion of law on facts as found is competent by decree. Wiley v. City of Sparta, 154 Ga. 1, 114 S.E. 45, 116 S.E. 116, 25 A.L.R. 1342 (1922).

Order violative of rights of creditors. — The minor legatees under a will, who are not the children of the testator, have no right in a case pending in superior court upon a petition filed by the executor, for direction to an interlocutory order setting apart money for their support, when the solvency of the estate was denied. Williams v. Mobley, 38 Ga. 241 (1868).

Interlocutory judgment conflicting with prior order. — Where the court enjoins the defendant from disposing of property except by the approval of court, at an interlocutory hearing to secure the appointment of a receiver and to impress a trust on said property, it is error for the court by a subsequent interlocutory judgment to order the defendant to deliver the property to plaintiff before an adjudication of the issue of the ownership of the property. James v. Park, 145 Ga. 356, 89 S.E. 416 (1916).

Apprehension of enforcement of municipal charter not ground for interlocutory injunction. — Where action is filed in a superior court, seeking to enjoin the enforcement of a provision of a municipal charter on the ground that such provision is unconstitutional, and where it appears that no arrest has been made, no property levied upon, and no other interference with the person or the property rights of the petitioner, but that the petition is based upon a mere apprehension that such may be done by the municipality, it is proper to refuse an interlocutory injunction. Southern Oil Stores, Inc. v. City of Atlanta, 177 Ga. 602, 170 S.E. 801 (1933).

Decree of a court of equity must follow the verdict, and may not embrace questions which the verdict does not cover. Gray v. Junction City Mfg. Co., 195 Ga. 33, 22 S.E.2d 847 (1942).

Trial by jury in an equity case is generally a matter of right under the law of this state. It is true the right does

not exist under the Constitution as common-law cases, but it is as clearly provided by statutes applicable generally to cases in equity. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

No right to jury trial created. — In view of the repeal of former Code 1933, § 37-1104 providing for jury trials of fact in equity cases, the last sentence of O.C.G.A. § 23-4-34 did not create, by negative implication, a right to trial by jury. Cawthon v. Douglas County, 248 Ga. 760, 286 S.E.2d 30 (1982).

It was error for the court to dismiss the plaintiffs' amended petition at an interlocutory hearing for temporary injunction, on the ground that the evidence was insufficient to authorize the grant of such preliminary relief. Because the allegations of the petition, as amended, if true, made a case entitling them to injunction, and whether an interlocutory injunction should or should not have been granted by the trial judge under the facts presented, the plaintiffs still had a right to have a hearing before a jury with a view of determining whether or not a permanent injunction should be granted. Jones v. Mauldin, 208 Ga. 14, 64 S.E.2d 452 (1951).

Cited in Bearden v. Longino, 183 Ga. 819, 190 S.E. 12 (1937); Manry v. Stephens, 190 Ga. 305, 9 S.E.2d 58 (1940); Gibson v. Gibson, 204 Ga. 437, 49 S.E.2d 877 (1948); Hartley v. Hartley, 211 Ga. 616, 87 S.E.2d 851 (1955); Shaw v. Miller, 215 Ga. 413, 110 S.E.2d 759 (1959); Jonesboro Inv. Trust Ass'n v. Donnelly, 141 Ga. App. 780, 234 S.E.2d 349 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 240.

C.J.S. — 31 C.J.S., Equity, §§ 510, 580 et seq.

ALR. — Divorce: right to enter final decree after time fixed by interlocutory decree expires, 1 A.L.R. 1591; 104 A.L.R. 654; 158 A.L.R. 1205.

Equity jurisdiction for cancellation of insurance policy upon ground within incontestable clause prior to termination of period, 73 A.L.R. 1529; 111 A.L.R. 1275.

Effect of failure of special verdict or special finding to include findings of all ultimate facts or issues, 76 A.L.R. 1137.

Effect of nonsuit, dismissal, or discontinuance of action on previous orders, 11 A.L.R.2d 1407.

Withdrawal of written special interrogatories or special questions submitted to jury, 91 A.L.R.2d 776.

23-4-35. Confirmation of sales under decrees.

Sales under decrees in equity shall be subject to confirmation by the judge, who has a large discretion vested in him in reference thereto. Such sales shall not be consummated until confirmed by him.

History. — Civil Code 1895, § 4856; Civil Code 1910, § 5429; Code 1933, § 37-1206.

History of Code section. — This Code section is derived from the decisions in Walter v. Hargrove, 61 Ga. 267 (1878) and Holmes v. Harris, 70 Ga. 309 (1883).

Law reviews. — For survey article on business associations, see 34 Mercer L. Rev. 13 (1982). For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

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General Consideration

CONFIRMATION GENERALLY
JUDICIAL DISCRETION
PLEADING AND PRACTICE

General Consideration

Cited in Wingfield v. Bennett, 36 Ga. App. 27, 134 S.E. 840 (1926); Dockery v. Parks, 117 Ga. App. 589, 161 S.E.2d 406 (1968); Dockery v. Parks, 224 Ga. 369, 162 S.E.2d 332 (1968); Brannon v. Simpson, 244 Ga. 58, 257 S.E.2d 541 (1979); Leggett v. Ogden, 248 Ga. 403, 284 S.E.2d 1 (1981); Pack v. Mahan, 294 Ga. 496, 755 S.E.2d 126 (2014).

Confirmation Generally

Disappointed buyer at first, nonconfirmed sale had no standing to challenge second sale. — In a judicial foreclosure sale held after a tax sale and redemption, the super lien holder's failure to give actual notice of the sale to the record owner and two lienholders justified the trial court's setting aside the sale under O.C.G.A. § 9-13-172; the disappointed buyer from that sale had no interest in the property and lacked standing to ask the court to confirm or set aside a second sale. Ga. Home Appraisers, Inc. v. Trintec Portfolio Servs., LLC, 349 Ga. App. 356, 825 S.E.2d 833 (2019).

Judgment rendered upon a jury verdict finding a sale valid is sufficient confirmation to meet the requirements. Palmour v. Roper, 119 Ga. 10, 45 S.E. 790 (1903).

Judicial Discretion

Judge vested with discretion as to confirmation of sales. — The discretion of the judge is a sound legal discretion and he cannot arbitrarily withhold his confirmation of a sale made under decree of the court. Pledger v. Bank of Lyerly, 157 Ga. 229, 121 S.E. 228 (1924).

Abuse of discretion generally. — A confirmation of a sale when there is a variance between the advertisement and the terms of the order of sale constitutes error. Slaughter v. Strother, 99 Ga. 633, 27 S.E. 764 (1896).

Where, in a suit to enjoin an exercise of a power of sale contained in a security deed, the sale was allowed to proceed subject to confirmation by the court, and on the question of confirmation, subsequently arising, the existence of the facts alleged as grounds of objection was the sole issue presented, and such issue was a matter of dispute under the evidence, the judge did not abuse his discretion in decreeing confirmation. Wilson v. Trustees of Union Theological Sem., 181 Ga. 755, 184 S.E. 290 (1936).

Pleading and Practice

After a judicial sale has been confirmed, the court has no discretion to rescind it except upon some special ground, such as fraud, accident, or mistake, which has worked an injustice, and which was unknown to the complaining party at the time of confirmation. Hurt Bldg., Inc. v. Atlanta Trust Co., 181 Ga. 274, 182 S.E. 187 (1935).

RESEARCH REFERENCES

ALR. — Doctrine of equitable conversion as affected by discretion as to time, manner or other circumstances of sale, where the duty to sell is mandatory, 124 A.L.R. 1448.

23-4-36. Decree transferable; lien.

A decree shall be transferable like other judgments and, when for money, shall constitute a like lien.

History. — Orig. Code 1863, § 4126; Code 1868, § 4158; Code 1873, § 4217; Code 1882, § 4217; Civil Code 1895, § 4859; Civil Code 1910, § 5432; Code 1933, § 37-1209.

JUDICIAL DECISIONS

A decree is of equal force with a judgment. Dean v. Central Cotton Press Co., 64 Ga. 670 (1880).

RESEARCH REFERENCES

ALR. — Remedy for enforcement of judgment lien after death of judgment debtor, 114 A.L.R. 1165.

23-4-37. Attachments for contempt; executions against property.

Every decree or order of a superior court or the Georgia State-wide Business Court in equitable proceedings may be enforced by attachment against the person for contempt. Decrees for money may be enforced by execution against the property. If a decree is partly for money and partly for the performance of a duty, the former may be enforced by execution and the latter by attachment or other process.

History. — Orig. Code 1863, §§ 3032, 4125; Code 1868, §§ 3044, 4157; Code 1873, §§ 3099, 4216; Code 1882, §§ 3099, 4216; Civil Code 1895, §§ 3944, 4858; Civil Code 1910, §§ 4541, 5431; Code 1933, §§ 37-123, 37-1208; Ga. L. 2019, p. 845, § 3-7/HB 239.

The 2019 amendment, effective May 7, 2019, inserted "or the Georgia State-wide Business Court" near the beginning of the first sentence of this Code section.

Law reviews. — For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 1 (2019).

JUDICIAL DECISIONS

Every decree or order of a court may be enforced by attachment for contempt. Williams v. William L. Lampkin & Co., 53 Ga. 200 (1874).

Contempt citation as branch of original equity case. — Where a proper citation for contempt is brought by the plaintiff in the original equity suit, it may be considered as a branch of the equity case and tried accordingly. Alred v. Celanese Corp. of Am., 205 Ga. 371, 54 S.E.2d 240 (1949).

The respondent in a citation for contempt is entitled to be apprised of the acts which he is charged with committing in violation of the injunctive order, so that he may be prepared to defend against such allegations on the hearing. Hortman v. Georgia Bd. of Dental Exmrs., 214 Ga. 560, 105 S.E.2d 732 (1958).

There is no requirement of law that a contempt petition be verified. Gore v. Gore, 217 Ga. 478, 123 S.E.2d 254 (1961).

A petition seeking to have a husband held in contempt of court for failure to pay alimony need not be verified. Brown v. Olen, 226 Ga. 492, 175 S.E.2d 838 (1970).

Injunction. — Injunction is distinctly an equitable remedy, and a court of equity acts in personam, not in rem. It is relief

which may be enforced by the court granting it by attachment against the party refusing to obey the mandates of the decree. Howard v. Warren, 206 Ga. 838, 59 S.E.2d 503 (1950).

Free speech does not protect. — When an order of court forbidding the use of threats, violence, and intimidation for the purpose of preventing others from engaging in their employment during a labor strike is violated, the violator can find no protection under the constitutional guaranty of free speech. Lassiter v. Swift & Co., 204 Ga. 561, 50 S.E.2d 359 (1948).

Cited in Howard v. Durand, 36 Ga. 346, 91 Am. Dec. 767 (1867); Clements v. Tillman, 79 Ga. 451, 5 S.E. 194, 11 Am. St. R. 491 (1887); Robbins v. Kinman, 177 Ga. 46, 169 S.E. 304 (1933); Bank of Tupelo v. Collier, 191 Ga. 852, 14 S.E.2d 59 (1941); Poss v. Norris, 197 Ga. 513, 29 S.E.2d 705 (1944); Person v. George, 211 Ga. 18, 83 S.E.2d 593 (1954); Henderson v. State Bd. of Exmrs., 221 Ga. 536, 145 S.E.2d 559 (1965).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Equity, § 27. 31 C.J.S., Equity, § 612.

ALR. — Jurisdiction, and propriety of its exercise, to require real property in another state or country to be applied in satisfaction of debt (including the setting aside of a fraudulent conveyance thereof), 144 A.L.R. 646.

Attachment statute as applicable to equity suits, 154 A.L.R. 95.

Power of equity court to reach or to sequester, for seizure and sale, beneficial equitable interests in corporate stock shares, 42 A.L.R.2d 920.

23-4-38. Enforcement of extraordinary remedies.

Injunction, ne exeat, prohibition, and other extraordinary remedies may be enforced by attachment for contempt.

History. — Orig. Code 1863, §§ 3157, 4127; Code 1868, §§ 3169, 4159; Code 1873, §§ 3237, 4218; Code 1882, §§ 3237, 4218; Civil Code 1895, §§ 4860, 4899; Civil Code 1910, §§ 5433, 5474; Code 1933, § 37-1210.

JUDICIAL DECISIONS

Injunction is distinctly an equitable remedy, and a court of equity acts in personam, not in rem. It is relief which may be enforced by the court granting it by attachment against the party refusing to obey the mandates of the decree. Howard v. Warren, 206 Ga. 838, 59 S.E.2d 503 (1950).

Respondent in a citation for contempt is entitled to be apprised of the acts which he is charged with committing in violation of the injunctive order, so that he may be prepared to defend against such allegations on the hearing. Hortman v. Georgia Bd. of Dental Exmrs., 214 Ga. 560, 105 S.E.2d 732 (1958).

Cited in Isaac Silver & Bros. Co. v. Kalmon, 175 Ga. 244, 165 S.E. 434 (1932); Alred v. Celanese Corp. of Am., 205 Ga. 371, 54 S.E.2d 240 (1949).

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